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No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

LAWRENCE ALLEN KATZ
Streich, Lang, Weeks & Cardon
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
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Solicitor General
Department of Justice
Washington, D.C. 20503
(202) 633-2217
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PETITION FOR CERTIORARI FILED MAY 28, 1982
CERTIORARI GRANTED OCTOBER 18, 1982

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PARTIAL TRANSCRIPT OF HEARING BEFORE NLRB ADMINISTRATIVE LAW JUDGE 53

ADDITIONAL DECISIONS AND ORDERS BELOW

The following items were reproduced pursuant to Rule 33.1 at the designated pages of the Petition for Certiorari:

Decision of the Ninth Circuit Court of Appeals A-3

Decision and Order of the National Labor Relations Board A-14

Decision of the Administrative Law Judge A-19

The material contained in the Joint Appendix has been reprinted exactly as it appeared in the record below, including typographical errors. Where an error may render the meaning of the sentence unclear, a "[sic]" has been inserted.

DOCKET ENTRY IN THE COURT BELOW

NINTH CIRCUIT'S ORDER [of March 2, 1982, Amending Opinion and Denying Rehearing]

[Caption deleted]

BEFORE: GOODWIN and CANBY, Circuit Judges and BYRNE, District Judge*

The opinion of this court in *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981) (advance sheets), is modified as follows:

*****

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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*The Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

PORTIONS OF THE RECORD BEFORE THE NLRB ADMINISTRATIVE LAW JUDGE

HANDBILL DISTRIBUTED BY DEMONSTRATORS, SEPT. 22, 1978

THE NATIONAL LABOR RELATIONS BOARD HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT, 3757 E. VAN BUREN STREET, FOR UNFAIR LABOR PRACTICES.

The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.

Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:

* Eight hour shifts with no specified breaks.
* No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
* Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
* Inconsistent management practices.
* Unwarranted sexual advances.
* A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

COMPLAINT IN *BILL JOHNSON'S RESTAURANTS, INC., ET AL. v. HELTON, ET AL.*, Maricopa County Superior Court Cause No. C375470

[Caption deleted]

Plaintiffs, by their attorneys, Streich, Lang, Weeks & Cardon, P.A., allege for their Complaint:

I. COUNT ONE: WRONGFUL INTERFERENCE WITH BUSINESS

A. *The Parties*

1. *Corporate Plaintiff.* Bill Johnson's Restaurants, Inc., an Arizona corporation (hereinafter referred to as "the Restaurant"), is, and at all times relevant herein has been, a corporation duly organized and existing under the laws of the State of Arizona, having places of business in Phoenix and Mesa, Arizona, including one at 3757 East Van Buren Street, Phoenix, Arizona.

2. *Corporate Plaintiff's Business.* The corporate plaintiff herein has been engaged in the business of owning and operating family restaurants in Arizona for over 20 years. Gross sales in 1977 exceeded four million dollars, and current assets exceed two million dollars. Approximately 100 persons are employed at the Restaurant's Van Buren Street facilities, including about 40 waitresses.

3. *Individual Plaintiffs.* Johnny Johnson and Rudy Johnson are members of the family which founded and operates the Restaurant, and they are Vice-Presidents of the corporate plaintiff. Don Kalfas is a shareholder and the General Manager of the corporate plaintiff. Each of the named plaintiffs is employed by the corporate plaintiff for the purpose of managing and operating the Restaurant, and each fulfills those responsibilities on a full-time basis.

4. *Named Defendants.* The named individual defendants are, on information and belief, all residents of Arizona. None of the named defendants is an employee of the Restaurant.

5. *Unknown Defendants.* John Does I-X and Jane Does I-X are individuals whose true names and identities are unknown to

plaintiffs at this time and who have participated in, encouraged, incited and supported the unlawful and injurious acts hereafter described.

B. *Mass Picketing and Harrassment*

6. *Picketing Begins*. On Wednesday, September 20, 1978, from approximately 9:30 A.M. to 2:00 P.M., defendants Myrland Helton, Cheryl Nichols, Carl Nichols, Carla Marie Scott, Dale Michaud, and Debra Mackie demonstrated in front of plaintiffs' Van Burean Street Restaurant, carrying signs which accused the Restaurant of unspecified "unfair labor practices" and "prejudice." The signs and statements made by said defendants to customers, indicated that local waitresses were boycotting and striking the Restaurant, although no such boycott or strike was in progress.

7. *Picketing Continues*. On Thursday, September 21, 1978, from approximately 5:30 P.M. to 8:00 P.M., defendants Myrland Helton, John Helton, Cheryl Nichols, Carl Nichols, and Carla Marie Scott, together with the Helton's son and another unidentified child, engaged in the acts described in paragraph "6" above.

8. *Defendants Publish Defamatory Leaflets and Statements*. On Friday, September 22, 1978, from approximately 11:00 P.M. to 12:30 A.M., defendants Myrland Helton, John Helton, Cheryl Nichols, Barbara Orr, Lawrence Orr, and Carla Marie Scott, together with the Heltons' son and an unidentified man, appeared at the plaintiffs' Van Buren Street Restaurant and passed out leaflets to plaintiffs' employees and customers. One of these leaflets is attached to the Affidavit of Rudy Johnson, sworn to on September 25, 1978. The leaflets contained false and outrageous statements, including misrepresentations of proceedings pending before the National Labor Relations Board and accusations that the Restaurant's waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." Additional outrageous and false statements maligning plaintiffs and their business were made orally by defendants to plaintiffs' employees and customers and to passersby and other persons.

9. *Interference with Plaintiffs' Operations*. During the picketing and leaflet distribution described above, defendants have

clogged the sidewalk in front of the Restaurant, making it inconvenient or difficult for other persons to pass, have shouted at and harrassed plaintiffs' customers, and have blocked ingress to and egress from the Restaurant. Some of the defendants have also harrassed plaintiffs' employees, in person and by telephone and have, on at least one occasion, coerced a job applicant into failing to appear for a scheduled interview at the Restaurant.

10. *Restaurant Continues to Operate*. Despite the defendants' activities described above, the plaintiffs have attempted to continue normal business operations.

11. *Potential for Violence*. The defendants' activities described above have engendered hostile reactions and tension among plaintiffs' employees and customers, and the defendants have intentionally provoked such reactions. Plaintiffs' employees and customers are concerned about their personal safety. On at least one occasion, plaintiffs felt it necessary to request assistance from the Phoenix Police Department and an officer was provided.

C. *Damage to Restaurant*

12. *Plaintiffs Have Suffered Loss of Business*. During and as a result of the defendants' activities described above, a substantial number of customers have, after entering the Restaurant parking lot or premises, departed without dining at the Restaurant. The exact number of such lost customers is difficult to ascertain, but plaintiffs believe the number to be in excess of 100.

13. *Damage to Reputation*. As a result of the defendants' activities described above, plaintiffs have suffered substantial and irreparable damage to their reputations and to the goodwill of their business. Such damage is not readily calculable in money terms.

D. *Defendants' Liability for Unlawful Acts*

14. *Unlawfulness of Acts*. The acts of the defendants, as described above, are tortious and unlawful and may be enjoined by this Court.

15. *Defendants' Participation in the Unlawful Acts*. Upon information and belief, each of the named individual defendants has

directed, authorized, encouraged, incited and participated in the unlawful acts described above.

16. *Irreparable Injury.* As a result of the unlawful acts of defendants described above, there is a continuous threat of serious violence, personal injury and property damage on or near plaintiffs' premises. Unless restrained, the defendants' acts create significant risks of injury to plaintiffs' employees, to plaintiffs' business, to plaintiffs' property, and to members of the general public. Said injuries would be substantial and irreparable.

17. *Greater Injury to Plaintiffs.* As to each and every item of relief sought herein, far greater injury will be inflicted upon plaintiffs and upon the public by the refusal to grant the relief sought than can conceivably be inflicted upon the defendants by the granting of such relief.

18. *No Adequate Remedy at Law.* Plaintiffs have no adequate remedy at law for the injuries inflicted and threatened by the activities herein complained of.

19. *Necessity for Restraint.* Upon information and belief, the unlawful acts complained of herein will continue to be committed unless restrained.

20. *No Prior Application.* No prior application for the relief sought herein or for similar relief has been made to this or any other court or judge.

II. COUNT TWO: LIBEL, BUSINESS DISPARAGEMENT

21. Each and every allegation contained in paragraphs "1" to "20" above is realleged and incorporated herein as if fully set forth.

22. *Injury to Business.* The leaflets, statements and other derogatory accusations made by defendants as described more fully above, tend to cause and have caused injury to the plaintiffs' business.

23. *Injury to Individual Plaintiffs.* The leaflets, statements and other derogatory accusations made by defendants, as described more fully above, have impeached the honesty, integrity and reputation of the individual plaintiffs.

24. *Publication by Defendants*. The defendants have published the aforesaid libelous statements by distributing documents containing the statements and by repeating the statements orally to plaintiffs' employees and customers and to other persons.

25. *Falsity of Defendants' Statements; Defendants' Malice*. The statements published by the defendants are false and misleading. Defendants published these statements knowing them to be false or in reckless disregard of whether they were false. Defendants knew the statements would injure plaintiffs, and defendants had a malicious intention to cause such injury.

WHEREFORE, plaintiffs pray that this Court:

1. Issue a temporary restraining order and preliminary injunction, the same to be made permanent on final judgment:

A. Restraining and enjoining the defendants and each of them, their officers, agents and employees, and all persons acting in concert or participation with them, from, in any manner or by any means,

(1) Entering upon plaintiffs' premises, or any portion thereof, for any reason without the express permission of the officer of plaintiff Restaurant in charge of such premises at the time, and refusing to vacate plaintiffs' premises when requested to do so by plaintiffs or their proper agents.

(2) Mass picketing, parading or demonstrating in proximity to plaintiffs' premises, *provided that* defendants shall be allowed, and shall be limited to, a total of four (4) individuals picketing, parading or demonstrating in a peaceful manner in proximity to plaintiffs' premises, and *provided further that* any such picketing, parading or demonstrating shall be conducted exclusively upon public property and not upon any property whatsoever owned by plaintiffs.

(3) Interfering in any way with the conduct of plaintiffs' business operations, including particularly but without limitation interfering in any way with the ingress and egress from plaintiffs' premises of plaintiffs' officers,

agents, employees, suppliers, customers, business contacts and deliverers of goods.

(4) Engaging in violence, threats of violence, harrassment or intimidation of any kind against plaintiffs' officers, agents, employees, suppliers, customers, business contacts or deliverers of goods, whether upon plaintiffs' premises or elsewhere.

(5) Publishing false and misleading statements concerning plaintiffs' business, officers, agents, employees, facilities or practices, including but not limited to allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970.

B. Further ordering that defendants named herein, and each of them, shall forthwith issue proper notice to all others acting in concert with them, publicly withdrawing and rescinding any orders, directions, requests or suggestions to do any of the acts restrained and enjoined under the foregoing paragraph; and that said defendants, and each of them, shall be responsible for supervising the orderly and lawful conduct of any and all persons participating in any picketing, parading or other demonstrations established or sponsored by said defendants in proximity to plaintiffs' premises, so as to insure compliance with the order of the Court;

C. Granting such other, further or different relief to which the plaintiffs may be entitled in the premises.

2. Grant final judgment against defendants and each of them for compensatory damages in such amount as the Court shall determine plaintiffs have suffered from the unlawful activities complained of to the date of final hearing.

3. Grant final judgment against defendants, and each of them, for punitive damages in the amount of $500,000.

4. Grant final judgment against defendants and each of them, as prayed for herein, with the costs and disbursements of this action, and provide such other and further relief in law and equity as may be appropriate in the premises.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By **Lawrence Allen Katz**
Lawrence Allen Katz
Nancy K. Splain

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Maricopa)

RUDY JOHNSON, being duly sworn, deposes and says:

1. I am Vice President of Bill Johnson's Restaurants, Inc., a corporation organized and existing under the laws of the State of Arizona, and I am one of the plaintiffs herein.

2. I have read the foregoing Complaint, and the allegations therein contained are true to my own knowledge except as to those matters therein alleged upon information and belief, which allegations I believe to be true.

Rudy Johnson
RUDY JOHNSON

SUBSCRIBED AND SWORN to before me this 25th day of September, 1978.

Sharon Lauzier
Notary Public

My Commission Expires:
2/28/79

STATE COURT PLAINTIFFS' MOTION TO SHORTEN TIME FOR TAKING DEPOSITIONS UPON ORAL EXAMINATION AND ORDER

[Caption deleted]

Plaintiffs, by and through their attorneys, Streich, Lang, Weeks & Cardon, P.A., pursuant to the provisions of Rule 30, Arizona Rules of Civil Procedure, hereby respectfully request this Court's order shortening the time for the taking of depositions upon oral examination.

Attached hereto and by this reference incorporated herein is a Memorandum of Points and Authorities in support of plaintiffs' Motion.

RESPECTFULLY SUBMITTED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

MEMORANDUM OF POINTS AND AUTHORITIES

Contemporaneous with the filing of the instant action, plaintiffs filed their application for a Temporary Restraining Order and Order to Show Cause, with affidavits in support thereof, requesting the Court to issue a Temporary Restraining Order restraining the defendants, and each of them, from trespassing upon plaintiffs' premises, mass picketing, interfering with the conduct of plaintiffs' business operations, engaging in violence or harrassment against plaintiffs, their officers, agents, employees, suppliers, or customers,

and from publishing false and misleading statements concerning plaintiffs or their business. Plaintiffs have also brought an Order to Show Cause seeking equivalent relief in the form of a preliminary injunction. In order to be fully prepared for the Order to Show Cause, plaintiffs herein respectfully request this Court's order shortening time for the taking of depositions.

As the pleadings on file with the Court indicate, none of the plaintiffs had any prior knowledge of the allegations and complaints that have been made by the defendants and which resulted in the actions plaintiffs seek to enjoin. Indeed, plaintiffs first learned of the complaints upon reading the handbills distributed by the defendants to plaintiffs' customers and employees. Plaintiffs have endeavored prior to the filing of their Complaint to determine as many facts as possible in order to consider the necessity and propriety of bringing this action. Nevertheless, because of the serious threat to the plaintiffs' business and reputation in the community posed by the defendants, plaintiffs were forced to act expeditiously and have been unable to obtain information which is in the possession of the defendants herein.

Rule 30(b)(3), Arizona Rules of Civil Procedure, provides that the Court may order that depositions be taken within a shorter period of time than stated in the Rule. In order that plaintiffs be fully apprised of the conditions and circumstances which resulted in the actions taken by all of the defendants and perhaps others, plaintiffs respectfully request this Court's order shortening time for the taking of depositions of those individuals named in notices attached hereto collectively as Exhibit "A," with the understanding that the depositions noticed for September 27 and 29, 1978, may be rescheduled for October 2 and 3, 1978, if those dates are more convenient to the witnesses that the dates reflected in the attached notices.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By **Lawrence Allen Katz**
Lawrence Allen Katz
Nancy K. Splain

ORDER

On Motion of the plaintiffs,

IT IS HEREBY ORDERED that the time for the taking of depositions of those individuals named in notices attached hereto collectively as Exhibit "A" shall be shortened, and that the depositions may be noticed for September 27 and 29, 1978, with the understanding that the depositions may be rescheduled on October 2 and 3, 1978, if those dates are more convenient to the witnesses than the dates reflected in the attached notices.

DONE IN OPEN COURT this 25th day of September, 1978.

Marilyn A. Riddel
JUDGE OF THE SUPERIOR COURT

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

MYRLAND HELTON

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Wednesday, the 27th day of September, 1978, at 1:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

JOHN HELTON

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Wednesday, the 27th day of September, 1978, at 3:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

BARBARA ORR

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 9:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

LAWRENCE ORR

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 10:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

DEBRA MACKIE

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 11:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CARL NICHOLS

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 1:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS

& CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CARLA MARIE SCOTT

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 2:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza

Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CHERYL NICHOLS

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 3:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

DALE MICHAUD

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 4:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

STATE COURT'S TEMPORARY RESTRAINING ORDER

[Caption deleted]

The Court having read the Plaintiffs' verified Complaint in this

action, together with the Affidavit of Rudy Johnson, the Vice-President of Plaintiff Restaurant, and the Affidavit of Lawrence A. Katz, Plaintiffs' attorney, both of which Affidavits were sworn to on September 25, 1978, it appears to this Court that this is a proper case for granting a Temporary Restraining Order; and that, unless the Temporary Restraining Order requested by Plaintiffs is granted forthwith, immediate and irreparable injury will result to Plaintiffs and to Plaintiffs' business and Plaintiffs' property located at 3757 East Van Buren Street, Phoenix, Arizona, and to Plaintiffs' agents and employees, and to citizens of the State of Arizona, which injury will include, without limitation:

a. Trespass by Defendants, and each of them and all those acting in concert with them, on the Plaintiffs' private property.

b. Violence, threats of violence, harrassment and intimidation by Defendants, and each of them, and all those acting in concert with them, directed against Plaintiffs' agents and employees engaged in the performance of their duties, and against Plaintiffs' customers.

c. Publication of false and misleading statements about Plaintiffs and Plaintiffs' agents and employees by Defendants, and each of them, and those acting in concert with them, directed at Plaintiffs' agents, employees and customers and intended to damage Plaintiffs' reputation and business.

d. Unlawful interference by Defendants, and each of them, and all those acting in concert with them, by and through all of the aforesaid methods, with the relationships between Plaintiffs and the agents and employees thereof desiring to work for Plaintiffs and between Plaintiffs and their customers.

e. Breaches of the peace by Defendants, and each of them, and all those acting in concert with them, and the danger of injury not only to Plaintiffs' property and to Plaintiffs' agents, employees and customers and their property, but also to innocent bystanders — all in derogation of the rights and interests of citizens of the State of Arizona.

It further appears to this Court that Plaintiffs have attempted

to give notice to Defendants by telephone of Plaintiffs' request for the immediate entry of this Temporary Restraining Order.

NOW, THEREFORE, based upon the foregoing, and upon the Plaintiffs' verified Complaint and the aforesaid Affidavits of Rudy Johnson and Lawrence A. Katz,

IT IS ORDERED, that Defendants, and each of them, and all those acting at their direction or in concert with them, be, and they hereby are, jointly and severally, restrained and enjoined from each and every one of the following:

a. Entering upon Plaintiffs' premises, or any portion thereof, for any reason without the express permission of the officer of Plaintiff Restaurant in charge of such premises at the time, and refusing to vacate Plaintiffs' premises when requested to do so by Plaintiffs or their proper agents.

b. Mass picketing, parading or demonstrating in proximity to Plaintiffs' premises, *provided that* Defendants shall be allowed, at any one establishment, and shall be limited to, a total of four (4) individuals picketing, parading, or demonstrating in a peaceful manner in proximity to Plaintiffs' premises, and *provided further that* any such picketing, parading or demonstrating shall be conducted exclusively upon public property and not upon any property whatsoever owned by Plaintiffs.

c. Interfering in any way with the ingress and egress from Plaintiffs' premises of Plaintiffs' officers, agents, employees, suppliers, customers, business contacts and deliverers of goods.

d. Engaging in violence, threats of violence, harrassment or intimidation of any kind against Plaintiffs' officers, agents, employees, suppliers, customers, business contacts or deliverers of goods, whether upon Plaintiffs' premises or elsewhere.

FURTHER ORDERED, that the Defendants named herein, and each of them, shall forthwith issue proper notice to all others acting in concert with them, publicly withdrawing and rescinding any orders, directions, requests or suggestions to do any of the acts restrained and enjoined under the foregoing paragraph of this Tem-

porary Restraining Order; and that said Defendants, and each of them, shall be responsible for supervising the orderly and lawful conduct of any and all persons participating in any picketing, parading or other demonstrations established or sponsored by said Defendants in proximity to Plaintiffs' premises, so as to insure compliance with the provisions of this Temporary Restraining Order.

FURTHER ORDERED, that any violation of this Temporary Restraining Order by any of the above-named Defendants, and each of them, and any and all others having notice of the terms of this Temporary Restraining Order, shall constitute contempt of this Court, and shall render any and all violators subject to punishment accordingly.

FURTHER ORDERED, that Plaintiffs shall give security in the sum of $500 upon the issuance of this Temporary Restraining Order as security for such damages as Defendants, and each of them, may incur if said Defendants, and each of them, are found to have been wrongfully restrained, such security to be deposited with the Clerk of this Court.

FURTHER ORDERED, that this Temporary Restraining Order shall be in full force and effect to and including the 5th day of October, 1978, unless its terms is [sic] extended by this Court or by stipulation of the parties, or unless it is dissolved prior to said date.

DONE IN OPEN COURT this 25th day of September, 1978, at the hour of 12:30 o'clock P.M.

Marilyn A. Riddel

JUDGE OF THE SUPERIOR COURT

STATE COURT DEFENDANTS' MOTION TO EXPEDITE [HEARING ON MOTION FOR PROTECTIVE ORDER]

[Caption deleted]

Defendants Helton, Nichols and Michaud, by and through their counsel undersigned, hereby move this Court for an Order Expediting hearing on their Motion for Protective Order. This Court has granted leave to the Plaintiffs to take depositions on October 2 and 3, 1978. Defendants' Motion for Protective Order relates to those

depositions. Accordingly, Defendants request hearing on their Motion for Protective Order prior to October 2, 1978.

DATED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: **David L. Niederdeppe**

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants Helton, Nichols and Michaud

ORDER

This Court having heard Defendants' Motion to Expedite Hearing, and good cause appearing,

IT IS ORDERED that hearing on Defendants' Motion for Protective Order shall be heard on the 29 day of September, 1978, at 8:30 A.M.

DONE IN OPEN COURT this 28 day of September, 1978.

Marilyn A. Riddel

The Honorable Marilyn Riddel
Judge of the Superior Court

Copy of the foregoing hand-delivered
this 28 day of September, 1978, to:

Lawrence A. Katz, Esq.
Streich, Lang, Weeks & Cardon
2100 First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003

David L. Niederdeppe

STATE COURT DEFENDANTS' MOTION FOR PROTECTIVE ORDER

[Caption deleted]

Defendants Helton, Nichols and Michaud, by and through their counsel undersigned, hereby move this Court for its Protective Order pursuant to Rule 26(c) of the Arizona Rules of Civil Procedure (hereinafter, A.R.C.P.). Defendants seek such an order *limiting the scope of examination* during the course of certain *depositions* noticed by Plaintiffs and expedited by this Court under the authority of A.R.C.P. Rule 30(a). The grounds for such an order are more fully set forth in the Memorandum accompanying this Motion. The Court's attention is respectfully directed to that Memorandum.

DATED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: David L. Niederdeppe

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiffs in this action seek discovery from the Defendants in the form of oral depositions *prior* to the expiration of A.R.C.P. Rule 30(a)'s 30-day time period during which leave of Court must be obtained. As is noted in the Motion, Plaintiffs have obtained such leave from the Court prior to the time Defendants obtained counsel. Plaintiffs requested leave for the early depositions on the grounds that discovery was needed "[i]n order to be fully prepared for the Order to Show Cause. . . ." In short, Plaintiffs apparently feel the need for such discovery to prepare for hearing on their

Application for Preliminary Injunction which is scheduled at the hour of 9:00 a.m. on October 5, 1978, before this Court.

Defendants move for a Protective Order which would *limit* the scope of examination by Plaintiffs during the depositions. The grounds for that Motion are threefold. First, Defendants submit that this Court's jurisdiction to issue *injunctive* relief is limited. Hence, the *scope of issues* at the hearing on Plaintiffs' Application for Preliminary Injunction is also limited. Accordingly, the *scope of examination* at depositions necessary to prepare for such a hearing *must be limited,* as well.

Second, the Defendants submit that by reason of the federal labor policy, the federal Freedom of Information Act [5 U.S.C. § 552] (hereinafter, "the FOIA"), and the decision of the United States Supreme Court in *NLRB v. Robbins Tire & Rubber Company,* ____ U.S. _____ 77-911, (Opinion June 15, 1978) (copy attached), the Defendants have a *privilege* which limits the scope of discovery available to the Plaintiffs. Such a privilege exists insofar as the Plaintiffs seeks to discover information relevant to the unfair labor practice charges filed by Defendant Myrland R. Helton against the corporation Plaintiff Bill Johnson's Restaurants, Inc. As noted below, hearing on the allegations contained in those charges is now pending at the National Labor Relations Board.*

Finally, certain of the Defendants in this action remain unrepresented. One of the basic purposes for A.R.C.P. Rule 30(a)'s 30-day limitation is to allow a Defendant to obtain counsel before depositions are taken. Depositions of such individuals should be precluded at the least until they obtain counsel.

Court's Limited Jurisdiction

At the outset, it should be noted that Defendants do not question the jurisdiction of this Court to issue injunctive relief in labor-relations situations where the alleged conduct sought to be enjoined includes violence and imminent threates to the public order. See *Youngdahl v. Rainfair,* 355 U.S. 131 (1957) and *Auto Workers v. Wisconsin Board,* 351 U.S. 266 (1956). Defendants believe that the

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*Plaintiffs make reference in their Complaint to the NLRB charges at Page 8, lines 3 through 10.

evidence to be developed at the hearing on Plaintiffs' Application for Preliminary Injunction will reveal that no such conduct has occurred. However, in the abstract, this Court would have jurisdiction over such claims of violence and public disruption.

Defendants *do* question the jurisdiction of this Court to enjoin the Defendants from the series of acts explicity excluded from such equitable relief by A.R.S. § 12-1808(B)(1) through (6). Those Sections provide that a preliminary injunction or temporary restraining order issued in a labor relations matter may not prohibit a person from:

1. Terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do.

2. Attending at or near a house or place where any person resides or works, or carries on business, or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working.

3. Ceasing to patronize or to employ any party to such dispute or from recommending, advising, or persuading others by peaceful means to do so.

4. Paying or giving to or withholding from any person engaged in such dispute any strike benefits or other monies or things of value.

5. Peaceably assembling at any place in a lawful manner and for lawful purposes.

6. Doing any act or thing which might lawfully be done in the absence of such dispute by any other party thereto.

Hence, any matter relating to the type of conduct protected by A.R.S. § 12-1808 is *irrelevant* to the hearing on Plaintiffs' Application for Injunctive Relief, and so not necessary for preparation for that hearing. Discovery should be accordingly limited.

Further, the Defendants seriously question the jurisdiction of this Court to enjoin the conduct which is alleged in Plaintiffs' Complaint to constitute trade libel or business disparagement. Defendants submit that injunctive relief will *not* lie, because: (1) Plaintiffs have an adequate remedy at law, and (2) the First Constitutional Amend-

ment's proscriptions concerning freedom of speech *preclude* the type of "prior restraint" sought by Plaintiffs.

While Plaintiffs could locate no Arizona decisions concerning the jurisdiction of this Court to enjoin a libel, the vast weight of American authority is to the effect that equity will *not* restrain a mere libel or slander. This is so, even though the false statement may injure the Plaintiff in his business, profession or trade. In the absence of acts of *conspiracy, intimidation* or *coercion,* and where no breach of trust or contract appears, equity will not enjoin a libel because the party wronged has an adequate remedy at law by an action for damages or criminal prosecution. *Annot., Injunctions as Related in Cases of Trade Libel,* 148 A.L.R. 853 (1944); *Robert E. Hicks Corporation v. National Salesmens' Trade Association,* 19 F.2d 963 (7th Cir., 1927); 43-A, *C.J.S., Injunctions,* Section 143 (1978). See also *Am Jur* 2d, *Injunctions,* Section 137

The authority cited by Plaintiffs in their Memorandum in support of their Application for Preliminary Injunction and Temporary Restraining Order is clearly the minority view. The citations omitted by Plaintiffs as their quotation of the *Corrigan* case are to California law. While the case may express California law, it is not binding here.

Texas Courts have apparently recognize both sides of the question. In *Lawrence v. Atwood,* 295 S.W. 2d 298 (Tx.Civ.App., 19 ____), the Court held that neither the fact that the publication is being continued or will be continued unless restrained, nor the fact that such continued publication is and will be injurious to the libeled party's business, nor the two together, appear to be sufficient to render the rule inapplicable. This is in direct contrast to the Texas authority cited by Plaintiffs.

In *Martin v. Reynolds Metals Company,* 224 F.Supp. 978 (D.C. Ore., 1963), *appeal dismissed,* 336 F.2d 876 (9th Cir., 1964), *aff'd* 337 F.2d 780 (9th Cir., 1964), upon which Plaintiffs rely, the Court, while authorizing the injunctive relief sought, recognized the *crucial importance* of the First Amendment in such cases. The Court stated that the better-reasoned opinions concerning whether equity would enjoin trade libel *weigh* the adequacy of the remedy at law *and* the possible encroachment on *free speech rights* which might result

from the injunction. In labor relations matters, free speech is clearly the favored aspect.

The policy of the federal labor law has always been to encourage debate. Indeed, in *Thornhill v. Alabama*, 310 U.S. 88 (1941), the Supreme Court stated that, ". . . the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."

Further, in *Letter Carriers, Old Dominion Branch, 496 v. Austin*, 418 U.S. 264, (1974), the Court *held* that the policy of the federal law is to favor *uninhibited, robust* and *wide-open debate* in labor disputes. The Court stated that the ". . . free-wheeling use of the written and spoken word . . ." had been expressly fostered by the Congress in the national labor law, and approved by the National Labor Relations Board. Hence, in labor relations matters, the element of *free speech* would raise the Constitutional objections to injunctive relief to a higher plane than they would be accorded in other actions. Defendants submit that even in those jurisdictions where alleged trade libels may be enjoined, the *free speech* aspect fostered and encouraged by the national labor policy would preclude injunctive relief. From the foregoing, it is clear that this Court has *no jurisdiction* to issue an order enjoining allegedly libelous statements. The Court has apparently agreed in the refusal to temporarily restrain the handbilling. Hearing on Plaintiffs' application for Preliminary Injunction should be limited to those matters over which the Court has jurisdiction. The Defendants request that this Court enter its Order so limiting the scope of examination at the scheduled depositions.

Under this approach, Plaintiffs would be free to inquire into the alleged acts of the Defendants over which this Court could exert its injunctive jurisdiction, if those actions were shown; i.e., violence or imminent threats of public disorder. Plaintiffs would also be free to *renotice* the depositions of Defendants *after* the expiration of the 30-day requirement of A.R.C.P. Rule 30(a), with respect to the *damage* aspects of the libel allegations. Depositions taken at that time would do no violence to the policy of A.R.C.P. Rule 30(a).

That policy is noted in Wright & Miller, *Federal Practice and Procedure*, Section 2104, with respect to the leave-of-Court re-

quirement of Rule 30(a) of the *Federal* Rules of Civil Procedure: "Most Courts have thought that leave should be granted only when some unusual circumstances or conditions existed that would be likely to prejudice the party if he were compelled to wait the required time." Since the only prejudice which could conceivably inhere to the Plaintiffs in this matter relates to the allegations over which the Court could *properly* exercise jurisdiction. The scope of the examination in depositions authorized *because* of that hearing should be limited to those matters.

Federal Labor Law Privileges

As is noted above, Plaintiffs' Complaint makes reference to an unfair labor practice charge filed at the National Labor Relations Board by Defendant Myrland R. Helton against the corporate Plaintiff. After its investigation, the National Labor Relations Board issued a Complaint against Bill Johnson's Restaurants, Inc., alleging violation of the National Labor Relations Act. Hearing on the allegations set forth in that Complaint is set for December 7, 1978.

In connection with the NLRB investigation of the charges made by Defendant Helton, certain of the Defendants here presented evidence to NLRB agents. Defendants believe that the federal labor policy givesn them a *privilege* with respect to evidence supporting the unfair labor practice charge, and request the Court to so limit discovery. If such an order does not issue, the Plaintiff will be able to do violence to the federal policy by obtaining *indirectly* what it could not get *directly*.

Section 6 of the National Labor Relations Act provides that the National Labor Relations Board may make rules and regulations necessary to carry out the provisions of the Act [29 U.S.C. § 156]. Historically, the NLRB has provided little pre-hearing discovery in unfair labor practice proceedings. The reasons for the Board's general *refusal to make discovery available to parties charged with unfair labor practices* is that employers or, in some cases, Union, will *coerce* or *intimidate* employees and others who have given statements in an effort to make them change their testimony or to not testify at all. As noted by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co., supra.*, this special dangeer flowing from pre-hearing discovery in NLRB proceedings has been recognized by the Courts for many years. See *NLRB v. Vapor Blast Manufacturing*

Co., 287 F.2d 402, 407 (7th Cir., 19 ____); *cert. denied* 368 U.S. 823 (1961).

The FOIA would make statements given to the Labor Board discoverable were it not for Section 7(A) of the Act, which provides that disclosure is not required of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings." In *NLRB v. Robbins Tire & Rubber, supra.*, the Supreme Court held that witness statements in *pending* unfair labor practice proceedings are *exempt* from FOIA disclosure, *at least until completion of the NLRB's hearing*. The Court so held because the release of such statements necessarily would involve the kind of harm that Congress believed would constitute an "interference" with NLRB enforcement proceedings — that of giving a party litigant *earlier* and *greater* access to the NLRB's case than he would otherwise have.

If the Plaintiffs are allowed to examine the Defendants here with respect to knowledge in their possession which relates to the unfair labor practice charges, the Plaintiff will have been able to obtain by indirect means that which it could not obtain by direct means. Defendants submit that the historical labor policy and Exemption 7(A) of the FOIA, as construed by the Court in *NLRB v. Robbins Tire & Rubber, supra.*, establish, for the purposes of this action, a *privilege* on the part of the Defendant which is *as broad as the subject matter of the unfair labor practice Complaint itself.* A copy of that Complaint is attached to this Memorandum.

As is noted above, such a privilege must remain in effect *at least* until completion of the NLRB's hearing. Until such time, the privilege as set forth above should operate to *preclude* the Plaintiff in this action (which is the Charged Party in the unfair labor practice proceeding) from obtaining discovery of matters *relevant to that Labor Board matter.* Defendants request this Court to enter its Order limiting the scope of discovery prior to the hearing to *preclude* inquiry into the matters set forth in the unfair labor practice Complaint.

Defendants Without Counsel

Certain Defendants in this action remain unrepresented. As is noted by Wright & Miller, *Federal Practice and Procedure*, Section

2104, Rule 30(a) of the *Federal* Rules of Civil Procedure (like in substance to the Arizona Rules) allows a certain time period before depositions may be taken. One of the reasons for this time period is to assure the Defendants of an opportunity to retain counsel and inform themselves as to the nature of the suit. With such reasons behind the 30-day requirement of Rule 30(a), the Court's Protective Order should *preclude* Plaintiffs from deposing *any of* those Defendants who remain unrepresented in this action.

CONCLUSION

For the foregoing reasons, the Defendants request this Court to issue its Protective Order in accordance with the authorities outlined above.

RESPECTFULLY SUBMITTED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: David L. Niederdeppe

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants
Helton, Nichols and Michaud

Copy of the foregoing hand-delivered
this 28 day of September, 1978 to:

Lawrence A. Katz, Esq.
Streich, Lang, Weeks, & Cardon
2100 First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003

David L. Niederdeppe

PARTIAL TRANSCRIPT OF PROCEEDINGS BEFORE STATE COURT JUDGE ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER

[Pages 6–21]

MR. NIEDERDEPPE [Attorney for State Court Defendants]: Your Honor, if you had a chance to review the Motion for Protective Order which was filed I won't go into a great deal on that, other than to note that it is our belief that the underlying purposes of this lawsuit are two-fold.

First, to chill the exercise of defendants of their First Amendment Rights and their rights under the National Labor Relations Act, Section 7, which gives them the right to engage in concerted activity for their benefit.

Secondarily, we believe to procure the kind of discovery which the National Labor Relations Board would not allow to the plaintiffs in that pending action. And, our Response, our Motion speaks to both of those issues.

It is our belief that the Court has no jurisdiction to issue an injunction which would prohibit or restrain the exercise by these defendants of First Amendment Rights.

If that is so, then the hearing on the Order to Show Cause is likewise limited. Since the plaintiffs in this action seek discovery to prepare for that hearing, we feel that the scope of discovery should be so limited.

Now, we feel that Rule 30 and its 30 day requirement would preclude the taking of depositions which would delve into other areas for that time period, because a trial may be pending on these allegations two years from now as to the damage aspect.

With respect to the injunction aspect of the allegation, we feel the scope should be at this time limited.

With respect to the second major thrust of the Motion for Protective Order, which is the position that the National Labor policy is to preclude this kind of discovery. I would note that the plaintiff's Response states that they have no desire to ask for the statements given by the individuals to the National Labor Relations Board.

However, if they are allowed to delve into the same area by way of deposition, the same result would be accomplished.

The plaintiffs state that the Robbins Tire and Rubber case, the case which was attached and the Freedom of Information Act speak only to those statements. That is true. However, the policy of the National Labor Relations Board has historically been to preclude discovery in these kinds of proceedings. That policy, in conjunction with the Robbins case and with the Freedom of Information Act Exception 7A, we believe give to those — these defendants, rather, a privilege until after the hearing to refuse to answer questions related to that particular proceedings.

One final note, I would — I don't have other copies of this case. I have come across a case which speaks to this type of situation and holds that an injunction is not a proper remedy for libel and one of the statements made in this case is that, "Statements describing unsanitary working conditions and alleging a lack of morals of supervisory personnel of an employer did not constitute a trade libel which would justify an injunction."

That statement seems to speak to exactly the situation in this case.

The case is Montgomery Ward vs. Department Store Employees of America. The citation is 400 Illinois 38, 79 Northeastern Reporter 2d 46. And, I have just one copy of the case that I could make available to whoever would care to examine it.

THE COURT: All right. Thank you.

Mr. Katz?

MR. KATZ [Attorney for Plaintiff Restaurant]: Your Honor, on approximately 20 hours notice what we have received is a thinly disguised Motion for Summary Judgment. I think the Motion is premature and inappropriate.

The defendants have attacked the merits of this case and they have sought to appeal from this Court's prior order.

As far as the issues they have raised in their brief, I do not believe there is any genuine dispute as to the Court's right to enjoin non-peaceful picketing and other massed assemblage.

The complaint before the Court seeks to enjoin non-peaceful activities.

The facts indicating whether or not the activities, which are complained of as having occurred in the past and as having been threatened to continue, those facts will be brought out at the hearing appropriately and the discovery is for the purpose of bringing out such facts.

Part of the action is, of course, a libel action also and as to that the defendants have raised claims of Constitutional issues of free speech and prior restraint First Amendment Rights. That is merely a smoke screen. There is no Constitutional Right to libel another person.

We are not seeking to limit or restrain in a prior fashion. We are seeking an injunction against a leaflet which has already been distributed. We are seeking to have it no longer distributed.

As far as the privilege they have alleged, Linn vs. United Plant Guard Workers points out, I think, on page 56 of the Supreme Court decision that there is no right to libel anyone else. There is no privilege under the Constitution.

As far as the Robbins case in the U.S. Supreme Court, that was a suit by employer under the Freedom of Information Act to compel the National Labor Relations Board to release certain statements they had obtained. They are not a party. We seek to release no such statements.

All we seek to do is, in normal discovery, is to ask the defendants for the facts behind the leaflets they distributed. We want to go through each and every fact in the leaflet and ask them, "Why did you make this accusation? What facts do you have to believe the accusation is true?"

We need that discovery in order to prepare for this proceeding if there is a question as to whether the Court has the right to issue preliminary relief. Part of the answer to that question will depend upon the facts that come out through discovery.

I would assume that the Court's decision as to whether to issue a preliminary injunctive relief might vary from case to case, depending on each fact situation.

All we want to do is get the facts necessary and supply the information to this Court.

Thank you, Your Honor. Nothing else.

THE COURT: Mr. Niederdeppe?

MR. NIEDERDEPPE: If I may respond briefly.

This Motion for Protective Order has been described as a thinly disguised or camouflaged Motion for Summary Judgment.

There is no seeking an order ending this action. There is no facts upon which we rely, at this stage, that the Court could decide, as a matter of law, that this action should be decided in the defendants' favor.

As I read the pleadings, I think the pleadings probably state a cause of action for the elements alleged. We haven't sought to block that.

With respect to the allegation in that complaint of mass pickets or violence, we concur if that kind of conduct occurred it may certainly be enjoined by this Court. And, the plaintiffs are certainly not precluded from investigating and taking deposition testimony with respect to those allegations.

We do feel that this Court may not enjoin the First Amendment Rights of these individuals and that, therefore, is not relevant to the hearing on the Order to Show Cause and the 30 day requirement of Rule 30A should be accorded the defendants on that point.

Finally, I would just note, and I pointed this out in the Motion, to the strong policy of the Labor Act encouraging freedom of speech, the line of cases from Thornhill vs. Alabama through the Linn case, which makes reference to that and to a later case which qualified Linn, which is Old Dominion Branch Number 496 of the Letter Carriers vs. Austin. It's a Supreme Court case and I don't have the citation. I think I may have cited it in the Motion.

That case holds that the Federal Labor laws favor an uninhibited, robust and wide open debate in these type of labor disputes.

That's exactly what occurred here. We feel the Court can't enjoin that kind of activity.

MR. KATZ: One further point?

THE COURT: Surely.

MR. KATZ: Defendants have expressed concern as to how we will utilize whatever we discover in these depositions. The issue, of course, before the Court is, will the discovery be relevant to this proceeding? If it is relevant to this proceeding, then the fact that it might be relevant to some other proceeding in some other forum is immaterial.

The only issue that is presented before you today is whether what we seek to ask in discovery is relevant to the proceedings before you now. We submit that it is.

THE COURT: Mr. Niederdeppe, it is your motion, you are entitled to the last word if you would like to have it.

MR. NIEDERDEPPE: I think I must say something.

With respect to the allegations of the complaint respecting libel, we concur that investigation, by way of deposition, interrogatories, or whatever methods under the discovery rules is proper with respect to libel. We are asking for the 30 day requirement of Rule 30A to be prepared.

We think such short notice where depositions are being taken four, five days after the complaint is filed if the issues on the hearing of temporary restraining order are limited, the discovery which is needed should be limited. That is all we are saying.

We are saying, with respect to the matters material to the labor case, the National Labor Relations Board case, that there is a privilege.

We are not denying that it may have relevance here. We are saying that until that hearing is held, the labor policy, the Freedom of Information Act and the Robbins case give these defendants that privilege.

THE COURT: If I read the complaint, or whatever the document is, from the NLRB, entitled that was attached to your Motion, the allegation made is that this young lady was fired because she was attempting to organize union activity. That is what came through in that complaint. I think that is what the hearing in December is going to involve.

MR. NIEDERDEPPE: That's correct.

THE COURT: That issue, that she was fired for that reason and thus subject to the NLRB and some disciplinary action or some adjudication.

The issues in this matter, as I see them are quite different and it will be the ruling of this Court denying the Motion for Protective Order. However, the allegations regarding union organizing and the statements made to any investigators in that case may not be inquired into. But, certainly the allegations regarding the other matters in the pamphlet may be inquired into.

MR. KATZ: May I seek clarification, Your Honor?

THE COURT: Yes.

MR. KATZ: The pamphlet contains numerous statements which we would like to inquire into.

One of the statements in the pamphlet is that Miss Helton was fired when she suggested to the waitresses that they should organize a union. That statement is similar to the statement that was made in the Linn case.

If I may refer Your Honor to that case. Reading from the pamphlet, the leaflet that was issued by the union in that case the following quotations appeared in that leaflet, "The men in Saginaw were deprived of their right to vote in three NLRB elections. Their names were not submitted. These guards were voted into the union in 1959. These Pinkerton guards were robbed of any pay increases. The Pinkerton managers were lying to us all the time the contract was in effect."

It goes a little further but I am stopping there.

Many of the allegations had been the subject of unfair labor practice charges before the Board, but I assume, since the U.S. Supreme Court said that a libel action in state court would properly lie, based on those allegations, that there would be no denial of discovery into the truth or falsity into those allegations.

We seek to ask questions regarding the truth or falsity of all the accusations made in the leaflet, regardless of whether or not those accusations appear in some other forum. That does not appear to us to be material to this particular case.

THE COURT: Your memorandum seemed to indicate that it

was the unwarranted sexual advances and a filthy restroom that you wished to inquire into and not the allegations regarding the NLRB proceeding.

MR. KATZ: If I may refer Your Honor to line 10 on page 2 of the memorandum. Part of the libelous statement is the defendants' have accused the plaintiffs of violating the law. They have accused us of discharging the defendant, Miss Helton, because she suggested to the waitresses they should organize a union. That is a violation of law and that is so perceived by our customers.

We believe Miss Helton made the statement knowing it to be false, making it with the intention of injuring us in our business and was done so maliciously.

Had she not distributed that pamphlet, had she kept her charges to the appropriate federal agency there might not have been a libel question, because she would be privileged to file the charges with the agency.

Having made the particular statement public, we have a right to defend and protect our reputation by asking the facts, why she made the statements to a public agency as opposed to some other forum.

MR. NIEDERDEPPE: I would merely point out that Linn vs. United Plant Guard Workers to which the plaintiffs have reference was a case which was not involving an injunction prior to the Board hearing.

It involved an action for damages which, of necessity, would be sometime later than the hearing.

All we are asking in terms of the labor privilege is what the Labor Board would give us, these individuals, that is to preclude discovery until the time of hearing, December 7th.

We are not asking that they never be able to try the issues, that is not the question.

THE COURT: Do you agree, pending the hearing, no more dissemation [sic] of that statement will be made?

MR. NIEDERDEPPE: I am sorry?

THE COURT: Do you likewise agree that prior, pending the

hearing in December, that your clients will no longer dissemate [sic] that statement publicly?

MR. NIEDERDEPPE: With respect to the National Labor Relations Board?

THE COURT: You betcha.

MR. NIEDERDEPPE: Would that be one of the conditions of the Court's order?

THE COURT: I am asking.

MR. NIEDERDEPPE: I am just saying we don't see that it would be of necessity.

THE COURT: The Motion for Protective Order then is denied as to these three sets of defendants. Those are the only ones to whom the ruling goes.

The other orders remain in full force and effect.

MR. KATZ: Is there then, Your Honor, any limitation on the —?

THE COURT: There is not, so long as it is relevant to the allegations made in this complaint.

It will be my ruling that if any witness, other than one of these parties, were asked about statements made to the NLRB, or that these parties were asked about statements made to the NLRB investigators that that would not be a proper question, but you may question them regarding the statements made publicly in Maricopa County, and the basis for those statements.

MR. KATZ: I understand. Thank you, Your Honor.

MR. NIEDERDEPPE: May I clarify?

I take it you have denied in totality the Motion for Protective Order?

THE COURT: I have.

MR. NIEDERDEPPE: So, if the plaintiffs in this matter delve into areas which are relevant to the Labor Board's complaint, in other words, whether or not this individual was fired for her union activity that is not protected?

THE COURT: The ruling is that the plaintiffs may inquire about any of the allegations made in this complaint.

They may not inquire as to what statements were made to NLRB investigators. That's not an allegation here that they falsely told an NLRB investigator something. That's not why we are here. And, they may not inquire or the answer may be refused as to what statements were made to NLRB people in that case by whom or who made the statements.

They may inquire as to the statements made in Maricopa County in this dissemination as to any matters regarding that statement, who they were made to, what the basis for it is, what facts they have to sustain the statements made in that publication in Maricopa County.

MR. NIEDERDEPPE: Thank you, Your Honor.

MR. KATZ: Thank you, Your Honor.

THE COURT: Yes, indeed. Have a good day.

We will stand in recess.

(Whereupon, the above proceedings were terminated.)

I, BRIDGET BRITTAN, Official Court Reporter herein do hereby certify that the foregoing 20 pages constitute a full, true and accurate transcript of the proceedings had in this matter on September 29, 1978, all done to the best of my skill and ability.

DATED this 29th day of September, 1978.

Bridget Brittan

BRIDGET BRITTAN
Official Court Reporter

STATE COURT DEFENDANTS' ANSWER AND COUNTERCLAIM

[Caption deleted]

Defendants, for their Answer to Plaintiffs' Complaint, admit, deny and allege as follows:

I

Defendants admit the allegations of Paragraphs 1, 2 and 3 of the Complaint.

II

Answering Paragraph 4 of the Plaintiffs' Complaint, Defendants admit that they are residents of the State of Arizona. However, Defendants deny, generally and specifically, each and every additional allegation of Paragraph 4.

III

Answering Paragraph 6 of the Complaint, Defendants admit that they picketed on the public sidewalk in front of Plaintiffs' Van Buren Street restaurant; that certain of the picket signs contained, among other things, the slogans "unfair labor practices," and "prejudice." Further, Defendants admit that they asked customers and potential customers of the Big Apple Restaurant to support them in their dispute with the restaurant by withholding their patronage until the dispute had been halted. Such conduct is clearly permitted under A.R.S. § 12-1808. Defendants deny each and every additional allegation of Paragraph 6.

IV

Answering Paragraph 7 of the Complaint, Defendants admit that they picketed on the public sidewalk at the Van Buren Street restaurant on September 21, 1978; that the Defendants named in Paragraph 7 were present for all or part of such picketing activity. Further, Defendants incorporate their Answer to Paragraph 6 of the Complaint by reference herein, and they expressly deny each and every allegation not specifically admitted in their response to Paragraphs 6 and 7.

V

Answering Paragraph 8 of the Complaint, Defendants admit that those Defendants named in Paragraph 8 of the Complaint did picket and distribute a limited number of handbills (Exhibit A to

Affidavit of Rudy Johnson) at public sidewalks in front of the Plaintiffs' Van Buren Street Restaurant. Defendants deny, all and singular, each and every additional allegation of Paragraph 8.

VI

Defendants deny, all and singular, each and every allegation contained in Paragraphs 5, 9, 11, 13, 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

VII

Answering Paragraphs 10 and 12 of the Complaint, Defendants are without sufficient knowledge with which to form a belief as to the truth or falsity of the allegations contained therein, and therefore Defendants deny the same.

Count II — Libel Business Disparagement

I

Answering Count II of the Complaint, Defendants adopt by reference and incorporate herein all of the admissions, denials, and allegations set forth in their Answer to Count I of the Complaint.

II

Defendants deny, all and singular, each and every allegation contained in Paragraphs 22 through 25 of the Complaint.

III

Defendants deny each and every allegation of Plaintiffs' Complaint not specifically admitted or denied herein.

AFFIRMATIVE DEFENSES

I

Defendants allege that Plaintiffs have failed to state a claim upon which relief may be granted.

II

Defendants further affirmatively allege that this Court lacks jurisdiction over the subject matter of the Complaint, the same having been pre-empted by the National Labor Relations Act.

III

Defendants further affirmatively allege that, under the provisions of the First Amendment to the United States Constitution, Section 7 of the National Labor Relations Act [29 U.S.C. § 157], Sections 4 and 7 of the Norris-LaGuardia Act [29 U.S.C. § 104 and § 107], and Section 12-1808 of the Arizona Revised Statutes, they acted lawfully in picketing and handbilling at Plaintiffs' premises to truthfully advise the public of the existence of a dispute between employees and former employees of Plaintiff Bill Johnson's Restaurant, Inc. and Plaintiff.

IV

Defendants further affirmatively allege that the statements made by way of the picket signs, handbills, and conversations with customers and potential customers were truthful and that each of the Defendants believed the statements to be true at the time they were made.

WHEREFORE, Defendants respectfully request that the Complaint be dismissed in its entirety, that the Temporary Restraining Order issued on September 25, 1978 be dissolved, that the Order to Show Cause issued on September 25, 1978 be quashed, that Defendants be awarded their costs of suit; and that Defendants be awarded reasonable and actual attorneys' fees incurred in the defense of this matter.

COUNTERCLAIM

Myrland R. Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl Nichols, Carl Nichols, Carla Marie Scott, Debra Mackie, and Dale Michaud, hereinafter Counterclaimants, for their counterclaims allege as follows:

I

Bill Johnson's Restaurants, Inc., an Arizona corporation; Johnny Johnson and Jane Doe Johnson, his wife; Rudy Johnson and Jane Doe Johnson, his wife; Don Kalfas and Marilyn Kalfas, his wife; Loginna Jean Johnson and John Doe Johnson, her husband; Sherry Sturgeon and John Doe Sturgeon, her husband; Dina Cameron and John Doe Cameron, her husband; Suzy Gay and John Doe Gay, her husband, a/k/a Lenny Walters; John Does I through X and Jane Does I through X, individuals whose names and identities are unknown at this time and who will be named after their identities become known, were at all times pertinent to this complaint acting for themselves individually and for and on behalf of all other Counterdefendants, hereinafter "the Family." Each of the husband-wife Defendants constitutes a single marital community.

II

Counterclaimants and Counterdefendants are residents of the State of Arizona or are presently existing corporations duly qualified and licensed to do business in Arizona; and the unlawful actions which are the basis of this complaint were perpetrated by "the Family" in Arizona.

III

On or about August 8, 1978, Myrland Ruth Helton was discharged from her employment at the Big Apple East, a restaurant where she had been employed as a waitress for seven and one-half years by "the Family."

IV

Mrs. Helton, prior to her discharge, had been actively engaged in activities protected by federal law; to wit: discussing the forming of a union with fellow employees. Determining this to be the cause of her discharge by "the Family," Mrs. Helton filed a charge with the National Labor Relations Board (The Board). The Board issued a Complaint on September 20, 1978, alleging that Mrs. Helton had been terminated because of her union activities.

V

Fellow employees of Mrs. Helton were told by "the Family" to inform Mrs. Helton's customers that "she had quit work to return to school." Mrs. Helton's fellow employees were told that Mrs. Helton was discharged for not complying with company regulations.

VI

By mid-September, 1978, the fellow employees of Mrs. Helton had become aware of what company regulations Mrs. Helton was alleged to have violated. These company regulations were as follows: (a) employees were not to chew gum while working; (b) employees were not to use the company phone for private use; (c) employees were to call in on a designated off-work day of each week referred to as a "call day" fifteen minutes prior to their shift.

VII

Mrs. Helton's fellow employees knew of their own knowledge that Mrs. Helton had not violated any of the aforementioned company policies prior to her discharge. They believed, as well, that the company regulations dealing with private use of the company phone and calling in on a call day had been countermanded by the immediate supervisor of Mrs. Helton's shift, the breakfast shift, and that no one on the breakfast shift felt obliged to comply with any of these regulations.

VIII

On September 18, 1978, believing that Mrs. Helton was discharged for union activities rather than the reasons given by the management, and knowing that "the Family" refused reinstatement, the majority of Mrs. Helton's work shift walked off the job in her support.

IX

On September 29, 1978, Defendants and Counterclaimants began picketing at the Big Apple East.

X

Shortly after the picketing began, Counterdefendant Sherry Sturgeon, a member of management, approached the picketers and confronted them with foul and abusive language, threats and obscene hand signs. She told Counterclaimants that it was the intention of "the Family" to "make you pay for this."

XI

Picketing continued on September 21, 1978 and September 22, 1978. Picketing did not exceed five hours on any of these days. On these three occasions, and on every occasion since, Counterclaimants have conducted themselves in a manner beyond reproach. Counterclaimants have never crowded the sidewalks in front of the restaurant or made it difficult for pedestrians to pass. Counterclaimants have not shouted at, harassed, or threatened employees of the restaurant or its customers or potential customers. At no time have the picketers blocked ingress or egress from the restaurant.

XII

On Friday, September 22, 1978, Counterclaimants distributed several handbills to passers-by listing their grievances. Counterclaimants knew of their own knowledge and belief that everything contained in the leaflet was true. They distributed these leaflets in an effort to educate the public as to what abuses they and others had suffered at the hands of "the Family" in the hope that doing so would aid in preventing such abuses in the future.

XIII

At all times relevant hereto, "the Family" was aware of the facts set forth in Paragraph XI preceding this paragraph. They were aware as well of the truthfulness of the statements set forth in the handbills distributed by the picketers. Yet, on September 25, 1978, "the Family" caused to be filed in the Superior Court of the State of Arizona, Maricopa County, the lawsuit of which this Counterclaim has become a part demanding punitive damages of One half Million Dollars ($500,000) plus compensatory damages, claiming that statements set forth in the leaflets distributed by Counter-

claimants were false and libelous and that Counterclaimants had harassed their employees and customers and potential customers This litigation declared also that Counterclaimants had blocked ingress and egress from the restaurant and had clogged the sidewalks in front of the restaurant. Along with the complaint, "the Family" requested a restraining order against Counterclaimants.

XIV

Counterclaimants believe this litigation is and was an attempt by "the Family" to use the Court system to harass, intimidate, terrorize and break down Counterclaimants. It appeared to be the attitude of "the Family" that its former employees could not afford or would not seek legal counsel and therefore would be manipulated to the point where Counterclaimants would discontinue exercising their right of freedom of speech without "the Family" having to correct its wrongdoing.

XV

As a result of the filing and processing of the lawsuit, Counterclaimants have suffered ridicule, emotional distress, limited employment opportunities. Counterclaimants cannot calculate the exact amount of damages at this time, but such damages will be proven at trial.

XVI

Counterdefendants' actions constitute a willful and deliberate abuse of process and a malicious prosecution designed to restrain Counterclaimants in the exercise of rights guaranteed under the Constitution and law of the State of Arizona and of the United States.

WHEREFORE, for this obvious and malicious abuse of process, Counterclaimants pray Judgment in an amount of compensatory damages to be proven at trial, plus exemplary damages in the sum of Two Million Dollars ($2,000,000), together with Counterclaimants' costs and reasonable attorneys' fees.

COUNTERCLAIM II

Each and every allegation contained in Paragraph I through XVI above is hereby realleged and incorporated herein as if fully set forth.

XVII

On October 25, 1978, "the Family" sought and received from the Superior Court a Temporary Restraining Order and Preliminary Injunction which hindered and limited Counterclaimants in exercising their civil rights and more specifically, those rights granted by Amendment I to the United States Constitution and A.R.S. Constitution Article 2, § 6, and § 12-1808 of the Arizona Revised Statutes.

XVIII

This Temporary Restraining Order and Preliminary Injunction limited the number of Counterclaimants who could picket at any one restaurant location at any given time. This meant, of course, that when four Counterclaimants were exercising their freedom of speech by picketing and/or handbilling in front of the Counterdefendants' Big Apple East restaurant, the other five Counterclaimants could not exercise their freedom of speech at this location and therefore were deprived of the same.

XIX

Although "the Family" spend several days prior to September 25, 1978, in the preparation of its litigation and request for Temporary Restraining Order and Preliminary Injunction, "the Family" did not notice in any way, shape or form the majority of Counterclaimants that a Temporary Restraining Order hearing was to take place and gave no more than one hour and ten minutes notice to the two Counterclaimants it did notice. The two Counterclaimants who were noticed of the hearing were noticed by telephone.

XX

In presenting its request for a Temporary Restraining Order and Preliminary Injunction to the Court, "the Family" knew or should have known that the picketing was peaceful, the handbills truthful and the conduct free of any violence, threats of violence, or obstruction of ingress and egress from the restaurant.

XXI

By wrongfully securing a Temporary Restraining Order against Counterclaimants, Counterdefendants have interfered with and restrained Counterclaimants in the exercise of rights granted under law; they have subjected Counterclaimants to ridicule; they have limited Counterclaimants' future employment opportunities, and they have forced Counterclaimants to pay substantial attorneys' fees and Court costs. Counterclaimants cannot ascertain at this time the extent of their compensatory damages except that they have incurred costs and attorneys' fees to date in excess of Four Thousand Dollars ($4,000).

XXII

Further, Counterdefendants' actions were willful, malicious, and conscious efforts designed to secure a wrongful Injunction.

WHEREFORE, Counterclaimants pray that they be awarded compensatory damages to be proven at trial, plus the sum of Two Million Dollars ($2,000,000) as and for exemplary damages, and costs and attorneys' fees pursuant to A.R.S. § 12-341.01.

COUNTERCLAIM III

Each and every allegation contained in Paragraphs I through XXII is realleged as if fully set forth.

XXIII

Since on or about August 8, 1978, Counterdefendants have slandered and published numerous libelous statements regarding the actions and motives of Counterclaimants. These libelous statements include a letter distributed by Counterdefendants to employees on

or about September 25, 1978. A true and correct copy of said publication is attached hereto as Exhibit A. [Exhibit omitted.]

XXIV

Counterdefendants knew the statements made in the slanderous and libelous publication were untrue and the statements were made with reckless disregard for their truth. Further, Counterdefendants' conduct was willful and malicious.

XXV

As a result of the libel and slander perpetrated by the Counterdefendants, Counterclaimants have been subjected to ridicule, humiliation, loss of employment opportunities and damage to their reputations. Counterclaimants are unable at this time to ascertain the amounts of damages which they have suffered as a result of Counterdefendants' libelous and slanderous statements.

WHEREFORE, Counterclaimants pray Judgment in an amount of compensatory damages to be proven at trial, for exemplary damages in the amount of Two Million Dollars ($2,000,000) and for all costs and reasonable attorneys' fees and for such other relief as to the Court appears just and proper in the premises.

WARD & CONTRERAS, LTD.

By: Michael J. Keenan
Michael J. Keenan
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants and
Counterclaimants

Copy of the foregoing delivered
this 13 day of November, 1978, to:

Lawrence A. Katz, Esq.
STREICH, LANG WEEKS & CARDON
2100 First National Bank Plaza
Phoenix, Arizona 85003

Michael J. Keenan
Michael J. Keenan

STATE OF ARIZONA)
) ss.
County of Maricopa)

WITNESSETH, the undersigned, for and on behalf of the Counter-claimants, being first duly sworn, verifies that she has read the foregoing Counterclaim, verifies that the account which is the basis of this Complaint is just and true, and that all facts stated herein are true and correct.

Myrland R. Helton
Affiant

SUBSCRIBED AND SWORN TO before me this 13th day of November, 1978.

My Commission Expires: 10-5-79

Gayle M. Weber
Notary Public

STATE COURT'S MINUTE ENTRY *RE* PRELIMINARY INJUNCTION, NOV. 16, 1978

[Caption deleted]

12:05 p.m. Order to Show Cause. Plaintiff represented by counsel, Lawrence A. Katz. Defendants are represented by counsel, Michael J. Keenan.

Court reporter, Bridget Brittan, is present.

Plaintiff's case:

Rudy Johnson is sworn and testifies.

Plaintiff's Exhibits 1, 2, 3 and 4 are marked for identification and received in evidence — photographs.

Sherry Sturgeon is sworn and testifies.

Marilyn Kalfas is sworn and testifies.

Lois Williams is sworn and testifies.

George P. Bolen is sworn and testifies.

Ruth Helton is sworn and testifies.

Plaintiff rests.

Defendant's counsel moves that the Temporary Restraining Order be dissolved, the Order to Show Cause quashed and the Application for Preliminary Injunction denied.

Based on the evidence presented, the Court finds there is insufficient evidence that would warrant the issuance of a Preliminary Injunction.

Ordered denying Request for Preliminary Injunction and dissolving the Temporary Restraining Order.

Day Girls -

Saturday Jan 1 all 10-6 girls will work 9-5!

Don't forget!!

Also

Anyone not coming to work Friday, Sat, or Sunday will be terminated.

There is NO Exception

Thank You

Shirley

PARTIAL TRANSCRIPT OF HEARING BEFORE NLRB ADMINISTRATIVE LAW JUDGE

[Pages 33-51]

MICHAEL KEENAN

was called as a witness by and on behalf of the General Counsel and having been first duly sworn on oath, was examined and testified as follows, to-wit:

THE WITNESS: Your Honor, may I make a preliminary statement before I begin to testify?

JUDGE JENSON: All right. Give us your name and your address, first, please.

THE WITNESS: My name is Michael J. Keenan. My address is 316 West McDowell Road, Phoenix, Arizona.

Your Honor, I'm here pursuant to a subpoena. I, as you know, am representing the charging party and others in Superior Court proceedings. I haven't at this point entered an appearance in the Board case, nor do I intend to. My particular problem, of course, with this case is that there's going to be a great deal of interplay between my testimony and having to refuse to answer questions because of the attorney client priviledge, and I want to make it clear on the record that my clients have not waived the attorney client priviledge and to the extent I answer questions which in my judgment are not priviledged, it's not my intention nor should it be construed that any of these answers constitute a waiver of the attorney client priviledge.

MR. PETTIBONE [Attorney for Board]: Your Honor, I would like to apologize to the Court for calling Mr. Keenan to the stand, out of turn chronologically. However, he as he previously stated has to be before the Ninth Circuit in Los Angeles tomorrow and is leaving for there this afternoon. So, I beg your permission to let him testify first.

JUDGE JENSON: Go ahead.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mr. Keenan, what is your occupation?

A. I'm an attorney.

Q. Do you know a Myrland R. Helton?

A. Yes, I do. I'm representing Mrs. Helton in connection with a Superior Court lawsuit.

Q. Is that Superior Court in the State of Arizona?

A. Yes, it is.

Q. Maricopa County?

A. Yes.

Q. When did you first meet Mrs. Helton.

A. I believe it was the Tuesday, the 26th of September, in the afternoon. Mrs. Helton came into my office.

Q. This year?

A. Yes, sir.

Q. Okay. Can you please tell us why she came to you?

A. She was referred to me by a client to — for the purpose of securing our firm to handle the Superior Court action which at that point consisted of a Temporary Restraining Order which had been issued by the Court on the 25th and a damage action, liable [sic] action which was part of the same proceedings.

Q. Did your firm agree to represent her?

A. Yes, we did on that day agree to represent Mrs. Helton and subsequently we undertook to represent all nine (9) of the defendants in that lawsuit.

Q. At the time Mrs. Helton — or at the time you agreed to represent Mrs. Helton, can you please tell us what, at that time, was the status of the lawsuit, in addition to the TRO?

A. Well, the restraining order had been granted with some modifications by Judge Rudell [sic] on the previous day, Monday morning I believe. That would have been September 25, 1978. And, of course, no appearances had been entered by any counsel and I believe a hearing was set on the Temporary Restraining Order for the following week, I think it was October 5th, although I'm not certain of the date.

Q. You say a hearing was set on the Temporary Restraining Order.

A. Application for Preliminary Injunction.

Q. Thank you. At the time Mrs. Helton visited you at your offices were depositions scheduled?

A. Yes, they were. At the time Mr. Katz secured the Temporary Restraining Order, I believe he also got the Judge to sign an Order expediting discovery and he had set depositions for the afternoon of Wednesday the 27th and the morning and afternoon of Friday, the 29th. Again, all these dates are '78 unless I indicate otherwise.

Q. Okay, and you said Mr. Katz, is that the same Mr. Katz that is here?

A. Larry Katz who was representing the company and who filed along with Nancy Splain the lawsuit and other papers.

Q. And is that the same Mr. Katz who's here today representing the Respondent?

A. Yes, it is.

Q. Were the depositions held as scheduled at that point?

A. No, they were not. The Order had, I don't recall the exact words, but some alternative dates for the scheduling depositions, and October 2nd and 3rd, I believe which would have been the following Monday and Tuesday. I called Mr. Katz on the 27th and advised him I was representing the Heltons and I believe at that time, Cheryl and Carl Nichols and that it looked as though we'd be representing all the defendants and that I would take advantage of his, or of the Court's order and postpone the depositions until the following week.

Q. Would you please tell us who said what during that phone conversation?

A. Well, as I recall there two conversations between Mr. Katz and I and I think there was a third conversation between Mr. Niederdeppe and my office and Mr. Katz. The first one, I believe, Larry may have called me and said I understand you're representing the Helton's. I don't remember who called whom. And, I don't remember too much of the conversation — too many of the specifics. I do remember the topics we discussed. One of which was the of course, the setting of the depositions, we also discussed the kinds

of questions he was going to ask in the depositions. Mrs. Helton had advised me that a Complaint had been issued in connection with the first of the cases, I don't know the number off hand, but the 883 case. And, I was concerned that he was going to use — during the course of the deposition to get into some of the matters that were the subject of testimony of Mrs. Helton and some of the others in the 883 case. So, we had a discussion about what he believed was relevant to the liable [sic] lawsuit particularly in relation to one paragraph of the handbill which had been distributed by Mrs. Helton and the other picketers. And, I think that the language was something to the effect that Ruth Helton had been terminated by the Big Apple Restaurant, Bill Johnson's Inc., on August the 8th after she had talked to other waitresses about forming a union. Larry and I had a fundemental difference as to what that paragraph meant. I told him that I didn't think there would be any problem with his asking questions about the sequence of events, mainly that Mrs. Helton had talked to people about forming a union prior to August the 8th and thereafter she was fired, but he said that the word after should be construed as because and that for that reason he felt it was relevant to go into the facts Mrs. Helton relied upon in determining that she had been fired for union activity. I told him at that point that I thought we would probably be filing a Protective Order Motion to limit the testimony of Mrs. Helton and others. I think all nine (9) of the defendants at that point had been scheduled for depositions. And, in fact, on Friday the 27th or 29th of September, two (2) of the depositions had been taken, Barbara Orr and Larry Orr, but the problem didn't really materialize there because Barbara Orr had terminated her employment several months before these events gave rise to the 883 case.

Q. In your disucssion with Mr. Katz on the phone, you testified that you discussed the scheduling of depositions. Did you discuss the scheduling of Mrs. Helton's deposition?

A. Well, yeah. I believe Larry wanted because of scheduling problems and primarily he indicated scheduling problems, he wanted to get Ruth Helton's deposition out of the way first thing Friday. I think he also indicated that after taking Mrs. Helton's deposition, there may not be need to take all nine of the defendants' depositions. And, I think I responded that because we were concerned about the scope of the examination, we might be filing a Protective Order

Motion and we'd need the additional time. So, I think we then, during one of these two conversations set a deposition schedule for everyone but the Orrs who had shown up on Friday, beginning on Monday morning with Mrs. Helton at 9:00 o'clock and Mr. Helton thereafter, and I forget the sequence after that.

Q. How about the second conversation, could you tell us briefly what that involved?

A. Well, I think we closed the first conversation with our discussion about whether or not we would try to limit the scope of his discovery, and he said he would write down the questions and call me back and let me know what questions he anticipated to ask. He did call me back, probably forty-five (45) minutes later, and he read me several questions. I can't remember the specifics of the questions, but they were all framed around the idea what facts did you rely upon in making the statement on the leaflet that you had been discharged because of union actvities, or after having talked about union activities. After he read those questions, I said that in my judgment that we would probably be moving to get a Protective Order from Judge Rudell [sic] to limit the discovery, because I felt that he was kind of using a back door approach to get —

MR. KATZ: Objection to any testimony about why Mr. Keenan took certain actions and what his legal reasons were for those actions. I think it's irrelevant to this proceeding.

JUDGE JENSON: I'll overrule.

BY MR. PETTIBONE:

Q. Mr. Keenan, was the — a Motion for Protective Order filed by your office?

A. Yes, it was. At that point, I asked Dave Neiderdeppe who's an associate in our firm to prepare the papers and take care of the argument or the Motion. We discussed the types of questions, Mr. Katz was asking, and I think that Dave then called Larry Katz and discussed the questions once again to see whether or not there was any prospect of limiting the questioning without our going after a Protective Order and Motion.

Q. Do you recall when the Motion was filed?

A. I think it was filed either Wednesday, the 27th of September

or Thursday the 28th. I know the hearing was set for Friday morning at 8:30 on the 29th of September.

JUDGE JENSON: What Order are you talking about?

MR. PETTIBONE: It's the — Motion, I may have said Order, I'm sorry. The Motion for Protective Order. Your Honor, with your permission, I'd like to raise those calendars to get a better view of what days occur when.

JUDGE JENSON: Okay.

BY MR. PETTIBONE:

Q. Mr. Keenan, as a result of the filing of the Motion for Protective Order, what happened?

A. Well, Judge Rudell [sic] essentially denied our Motion and agreed with Mr. Katz's theory that the types of questions relating to the facts upon which Mrs. Helton relied in contending that she was discharged for union activity was relevant to the lawsuit because it had been mentioned on the allegedly liabless [sic] handbill.

Q. Did she make her ruling after a hearing?

A. Well, after oral argument, yes. The Motion was filed and the hearing was expedited and then Mr. Katz and Mr. Niederdeppe argued before Judge Rudell [sic] on Friday morning the 29th at 8:30 a.m., I think.

Q. Okay, was Mrs. Helton's deposition taken?

A. Yes, it was taken, before I go on I might say that the Judge also ordered in addition to agreeing with Mr. Katz's theory, she entered an Order that Mr. Katz was not permitted to go into the substance of any statements given to the NLRB. Mrs. Helton's deposition, in answer to your question, was eventually taken. It was taken about 9:00 a.m. on Monday the 2nd of August, or October.

Q. Were there any other depositions taken at that day?

A. Yes, there were. There were two (2) additional depositions taken that afternoon, John Helton and — was the next in order and Johnny Johnson, who's an official of Bill Johnson's restaurants deposition was also taken that day.

Q. Okay, who is John Helton?

A. John Helton is Ruth Helton's husband. He was also named as a defendant in the civil court lawsuit.

Q. Other than the depositions of the Orrs which you previously mentioned, were the depositions of any other named defendants taken before that of Mrs. Helton?

A. No, they weren't. I believe they were scheduled for the afternoon of the 2nd and the morning of the 3rd because we still had the October 5th hearing date to contend with and we were trying to get the depositions taken.

Q. During the taking of Mrs. Helton's deposition, was she asked to respond to questions regarding her union activities?

A. Yes, I believe she was.

Q. Can you tell us what happened after her deposition was taken?

A. Well, the deposition was completed probably somewhere between 11:30 and noon, and we decided to postpone the other depositions until after the noon hour. At that point, I think Mr. Katz asked me to step into his office. He wanted to talk to me, and we discussed and I think, attorney client priviledge, Your Honor, would prohibit me from talking about the substance of the conversation, but one of the topics a — was a possible settlement.

Q. Okay. During the discussion was the taking of the remaining depositions also discussed?

A. Yes, it was. We at that point, began talking about putting off the October 5th hearing.

Q. That's the hearing I assume on the Preliminary Injunction?

A. Yeah, and rescheduling the depositions to some time prior to the new hearing date.

Q. Was the hearing postponed?

A. It was after we had — I had agreed to convey the settlement offer to my clients and we determined that we'd need more time than the three (3) days which we had. So, we agreed to stipulate to continue the Restraining Order as modified by Judge Rudell [sic], in effect, until, I believe it was the 14th of October, I don't know if I'm clear on that date.

Q. Do you recall, was that hearing on the request for a Preliminary Injunction postponed once or more than once?

A. It was postponed twice by stipulation and once by the Court because of scheduling problems. It was postponed twice by stipulation between Mr. Katz and myself, and on both of those occasions we agreed to extend the TRO as modified, Restraining Order.

Q. And, were the depositions rescheduled?

A. Yes, they were. They were finally — I can't recall exactly when they were taken. Some were never taken. There were a couple of — at least one of the defendants deposition was never taken because she moved to New York. I believe they were taken the 10th of November and the 13th of November, because by this time we reset the hearing for the second time to the 14th of November.

Q. Which of the defendants had moved to New York?

A. Debby Makey had to go back for surgery and she's still in New York as I understand it.

Q. During the depositions of the other defendants, were they asked questions about any union activities of Ruth Helton?

A. Yes, they were, I believe. I'm sure they were. In fact, Miss Splain and I — Miss Splain took several of the depositions and we each made a statement on the record as to what we believed the admissability of that sort of testimony was and in light of Judge Rudell's [sic] Order. And, I think that's all a matter of record. Those statements were all made on the record at the depositions.

MR. PETTIBONE: Your Honor, may I approach the witness?

JUDGE JENSON: Of course.

BY MR. PETTIBONE:

Q. Mr. Keenan, I'm going to hand you a rather large accumulation of documents. Have you seen that before?

JUDGE JENSON: Show a copy to Mr. Katz.

MR. PETTIBONE: I'm sorry, Your Honor.

A. Yes, I have had an opportunity to look these over before the hearing. I've seen everything except the index of General Counsel's Exhibit 2.

Q. That's the top page?

A. Yes.

Q. Okay, and are all of the documents contained therein your papers filed by the parties in the State Court action or Orders or transcripts of proceedings before the Court?

A. Yes, I believe that Exhibit h is — I'm not sure whether it's a complete transcript of the deposition of Mrs. Helton, but I — there are several depositions and I can't say for certain that these are complete. I didn't look through them. But, with that qualification, I believe all of these papers were either filed with the Court or by the Court or transcripts of proceedings related to those — to the Court action.

MR. PETTIBONE: Your Honor, at this time I move for the introduction of General Counsel's 2 to — 2(a) through 2(j) into evidence.

JUDGE JENSON: Now, what is it? These are the State Court proceedings?

MR. PETTIBONE: Right.

JUDGE JENSON: Any objections?

MR. KATZ: Yes, we do have objection in part. Items (a) through (e) on the list and item (i) are not objected to. (a) through (e) and (i) are not objected to. We object to item (f) as irrelevant for the counsel — for the General Counsel to introduce the Motion and the supporting memorandum of the defendants in the case has no bearing on any issues related to the restaurant's bringing of the lawsuit. And, their intent and their purpose and their basis from bringing the lawsuit. It would be just a self-serving document to present to this Court. And, of course, they haven't presented the documents filed by the restaurant only those filed by the defendants. So, it's irrelevant and it's only partial, and therefore it's objectionable on both grounds. Item (g) is also irrelevant. The transcript of proceedings on the Motion for Protective Order doesn't have any relevance to the issue before this Court now which was the respondent's intent and purpose in bringing the lawsuit initially and finally on — excuse me, not finally, next to finally, Item (h) copies of pertinent portions of the transcripts, I think it's objectionable not to submit the entire transcript but just to select portions chosen, I

assume, with a particular purpose in mind, presents an incomplete picture and is therefore objectionable. Finally, now, Item (j) we also feel is irrelevant, what the Court did several months after the bringing of the lawsuit in terms of the Preliminary Injunction, has no bearing on the issues before this Court including whether the Respondent, the restaurant had a reasonable basis for bringing the suit at the time it was filed. We would ask that (a) through (e) and (i) be left attached to the Exhibit and that the objectionable sections of this Exhibit be removed.

MR. PETTIBONE: Your Honor, would you care for a response?

JUDGE JENSON: Yes.

MR. PETTIBONE: First of all General Counsel's Exhibit 2(f), Respondent has objected on the basis of relevancy. The Defendant's memorandum of points and authorities, which I believe is objectionable primarily too. He has offered for picture of completeness to show the Respondent's to show the reasons for the Respondent's thereto, which is included thereto in the exhibit. That is included in Exhibit 2(f). 2(f) although it's helpful, it isn't completely understandable I don't believe without seeing what it is responding to, which is why Defendant's memorandum was included.

JUDGE JENSON: Well, do you intend to introduce certain documents with respect to the Court proceedings, too.

MR. KATZ: I can't answer that at this time, Your Honor, until I see what they present.

JUDGE JENSON: Well, this is about an inch thick and I haven't had a chance to read it yet.

MR. PETTIBONE: Your Honor, would you like me to respond to the other items as well?

JUDGE JENSON: Okay.

MR. PETTIBONE: Okay. The Exhibit 2(g), which Respondent has objected to as irrelevant. That is a copy of the transcript of proceedings on the Motion for Protective Order. It is very relevant. It is the General Counsel's position, that that transcript reveals the basis for the Respondent's claim that the handbill was liabless[sic]. And, also reveals that the claim was frivolous and a sham and only

a means of obtaining discovery of the General Counsel's case, Case number 4970. Argument of counsel there for the Respondent reveals the true motive. And, that's why General Counsel has included that in the Exhibit.

With respect to (h), —

JUDGE JENSON: Before you go on, off of (g), am I getting, do I just have a poor copy here or is this thin paper?

MR. PETTIBONE: It's thin paper, Your Honor. The bold faceprint is the print on that page and what's printing through is the print on behind pages.

JUDGE JENSON: All right, go ahead.

MR. PETTIBONE: With respect to General Counsel's Exhibit 2(h), I believe Respondent objected that the — objected to the fact that only portions of the depositions included. I did that because I didn't want to go through the trouble of photocopying the entire thing, and including them and make an overwhelming document. If Respondent wishes to introduce the remaining portions of those depositions, I would have no objection.

With respect to Exhibit 2 — I believe that takes us to Exhibit 2(j), I offered that only for completeness, that is what the Judge did with the hearing for the Preliminary Injunction. I just thought it would help in giving us a complete picture, for that reason I thought it was relevant.

JUDGE JENSON: Well, the only thing that really bothers me about it, is (h) copies of what you consider the pertinent portions of the transcripts. The rest, of course, I haven't looked at it. I don't know whether it's relevant or whether it isn't. But sometime I would have to read it to find out if it is or isn't relevant, but for the purposes of going on with the hearing now, I'm going to receive all but (h) and at such time as I do have an opportunity to go through this, I'll have to determine whether the rest of it is relevant or not. I don't know right now. So, I guess you'll just have to trust me to make such a determination.

MR. PETTIBONE: Your Honor, may we go off the record for a minute?

JUDGE JENSON: Wait a minute. Now, so far as (h) goes, the

transcript of the depositions, I would assume the two (2) of you can come to some agreement on that. Is what is in here pertinent or is it not and is there other pertinent material. You two can discuss that off the record.

MR. PETTIBONE: Your Honor, are we still on the record?

JUDGE JENSON: Yes.

MR. PETTIBONE: As I said before, if Respondent wishes to introduce the remaining portions, we would have no objection.

JUDGE JENSON: Well, let's see if you can't come to an agreement with respect to (h). (h) is not received at this point, it's reserved.

(The documents previously marked as 2(a) through 2(j) for identification were received in evidence, except 2(h), which was rejected.)

[Pages 52–57]

CROSS EXAMINATION

BY MR. KATZ [Attorney for Restaurant]:

Q. Michael, may I call you Michael? Do you recognize that document?

A.[By Michael Keenan] Yes, I do. I am told that this is the handbill which was distributed on a couple of days in September, I believe the 22nd was the first day, and also for a short time as I understand it on the 26th of September.

Q. Is this an accurate copy of that document?

A. Yes, this is the — this is an accurate copy of the copy which was attached to your Complaint.

MR. KATZ: We'd like to offer that in evidence as Respondent's Exhibit 1 or 3 or whatever.

JUDGE JENSON: Respondent's 1.

(The document previously referred to

was marked as Respondent's Exhibit No. 1 for identification.)

JUDGE JENSON: Any objection?

MR. PETTIBONE: No objection, Your Honor.

JUDGE JENSON: Received.

(The document previously marked as Respondent's Exhibit No. 1 for identification was received in evidence.)

BY MR. KATZ:

Q. You say that this document was attached to the Complaint that was filed in the State Court proceedings?

A. Yes, it was.

Q. Were you present during most of the depositions that were taken by Respondent in connection with that State Court proceeding?

A. I believe I was present during all of the depositions.

Q. And, was this leaflet the subject of questions asked during the depositions?

A. Yes, I think the leaflet was the subject of questions asked of all the witnesses on both sides, and they were numerous as I recall. They were probably twelve (12) to thirteen (13) depositions taken.

Q. Now, the second paragraph in Respondent's Exhibit 1, refers to Miss Helton's discharge. Were the questions asked during the deposition about Miss Helton's discharge in reference to this paragraph? In Respondent's Exhibit 1?

A. Well, as you know, they were in reference to your construction of the paragraph which I strongly disagreed throughout the proceedings, namely that the word after should be replaced by the word, before on line 3 of the second paragraph.

Q. Okay, Did you also take depositions?

A. I did.

Q. And, do you recall how many you took?

A. I believe I took four (4) of them.

Q. Do you remember whose depositions you took?

A. John Johnson, Rudy Johnson, Don Kalfas and Suzie Gay, I believe those were the only ones.

Q. During those depositions, did you ask questions which were calculated to determine whether they had any knowledge of Miss Helton's union activities?

A. I asked questions after first making a preliminary statement that because I was unsure of what Judge Rudell's [sic] Order indicated and because I was — because of your construction of this paragraph, I was put in the position of having to defend it in the liable [sic] actions, that I would go into that area, yes. I don't think I asked it of all of them, just a couple.

MR. KATZ: Your Honor, I'd like to move that Mr. Keenan's testimony is non-responsive to the question, that I just asked and also should be stricken. And, I'd ask that he respond to the specific question that was asked.

JUDGE JENSON: I thought he did.

MR. KATZ: I didn't ask him what his reasons were for asking questions, I asked whether he asked the questions or not.

JUDGE JENSON: Well, denied. Go ahead.

BY MR. KATZ:

Q. Referring you to General Counsel's Exhibit No. 2, Item (g) is a transcript of proceedings on the Motion for Protective Order before Judge Rudell [sic].

JUDGE JENSON: Which one now?

MR. KATZ: Item (g) in Exhibit No. 2.

BY MR. KATZ:

Q. Of that two (2) pages of that transcript include provisions setting forth the Judge's ruling and begin on page 19, line 6, where the Judge begins by saying, "It will be my ruling," and that continues on to line 14, and then the Judge begins again on line 25, and says, "The ruling is as follows," and then it goes over to the next page line 15. I ask that you read that ruling for a moment to refresh your recollection. Is that transcript a faithful reproduction of the Judge's ruling as you remember it?

A. Well, as I testified earlier, I wasn't present at this hearing. David Neiderdeppe was — it's an accurate transcription of the transcript I read several weeks ago.

Q. All right. When you participated in the depositions, and I believe you testified that you were in each of the depositions that Respondents took.

A. I believe so.

Q. Did the Respondents comply with that ruling of the Judge?

MR. PETTIBONE: Objection, Your Honor. He's asking Mr. Keenan to make a conclusion — to draw a legal conclusion. As Mr. Keenan has stated, the parties are in disagreement as to whether the questions posed by Respondent's counsel in those depositions were within the Order. Mr. Keenan has already testified to that, and for Mr. Katz to ask him now, whether or not the questions the Respondent complied is not only asking for a legal conclusion, but asking a question that's been asked and answered.

JUDGE JENSON: Wait a minute. He's expressed an opinion as to whether he has complied or not, now I'll permit it. Go ahead. I don't know what value it's going to be but let's find out. Overruled.

A. Will you repeat the question, please?

Q. The question is, during those depositions in which you participated, did the Respondents in this matter comply with the Judge's Order as it appears in pages 19 and 20 of the transcript?

A. I'll preface that by saying that the Order of Judge Rudell's [sic] is unclear now as it was the first time I read it, and I'm not sure exactly what she was saying. Both Mr. Katz and Miss Splain did generally proceed [sic] any questions relating to what I considered material relevant to the 883 case by indicating that it wasn't their intention to get into the NLRB proceedings or any statements given. However, in my opinion, the questions which were asked thereafter did just that. And, the best way I can answer your question about Judge Rudell's [sic] Order is as I read the Order the questions did go into matters which were subject of testimony at the NLRB and I think I made that comment prior to answers to questions having been given.

Q. Well, Judge Rudell's [sic] Order states that on page 20 line

2, they may not inquire as to what statements were made to NLRB investigators. Did the restaurant's counsel in depositions ask about what statement were made to the NLRB investigators?

A. No, but they both counsel did ask questions after I indicated that certain statements had been made to the NLRB investigators, I believe. That's my recollection. And, I might point out, I guess these aren't a matter of record, but the it's my opinion that both parties made very special efforts to put on the record, during the depositions their positions concerning the applicability of Judge Rudell's [sic] Order to certain questions.

[Pages 61–63]

THEREUPON,

MRYLAND [sic] R. HELTON

was called as a witness by and on behalf of the General Counsel and after having been sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Your name and home address please.

THE WITNESS: Mryland [sic] Ruth Helton, 1634 West Andorra Drive, Phoenix.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mrs. Helton, do you have any nicknames?

A. Yes, by [sic] nickname is "Bird".

JUDGE JENSON: You're going to have to talk louder.

BY MR. PETTIBONE:

Q. Would you spell that please?

A. B-I-R-D.

Q. Do you ever go by anything else?

A. I go by Ruth also.

Q. May I call you Ruth?

A. Sure.

* * * * *

[By Mr. Pettibone, Attorney for Board]

Q. Were you ever employed by Bill Johnson's Restaurants?

[By Ruth Helton]

A. Yes, I was.

Q. Where?

A. At 3757 East Van Buren.

Q. Is that in Phoenix?

A. Yes.

Q. And, when were you first employed there?

A. I think it was the second month, the second day of '72, I think.

Q. And until when were you employed there?

A. Until the 8th of August, 1978.

Q. Why was August 8, 1978 your last day?

A. I was fired.

[Pages 92–101]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th of this year, what did you do that day?

A.[By Ruth Helton] We picketed the Big Apple.

Q. All right. Who was we?

A. Me, and Dale Michaud and Cheryl Nichols and Carl Nichols was there and Carla Marie Scott — guess Johnny Helton was there for about fifteen (15) minutes.

Q. Okay, and you said the Big Apple, where?

A. The Big Apple Restaurant on 3757 East Van Buren.

Q. Had you picketed the restaurant before?

A. No, we hadn't.

Q. Had you picketed any of the other Bill Johnsons restaurants before?

A. No.

Q. Did you picket on other days?

A. Yes, we did.

Q. What did the sign say that you carried on any of the days you picketed? Or that any of the picketers carried that you can recall?

A. It said, boycott the Big Apple, Big Apple Little Management, Big Apple rotten to its employees, Support your local waitress, Boycott Big Apple, Big Apple unfair to waitresses, Big Apple Prejudice, Unfair Labor Practice, it said the Big Apple has been accused unfair labor practice, Complaint Number and gave the Complaint number. And, it said, the union would work to the disadvantage of everyone concerned, signed the Johnson Family. Johnson Family antiunion.

Q. Do you know why that was on the sign?

A. Yes, because it's what they printed and — in a letter that they passed out to the employees after I was fired.

Q. How many different signs were there do you recall approximately?

A. There was five (5) and then we turned one of them over and made another one. But there was only five (5) at any one time.

Q. Did you have any conversations with any supervisors the first day of picketing?

A. Yes.

Q. With whom?

A. Sherry Sturgeon, and she's the day supervisor.

Q. And, where was that conversation?

A. It was on the sidewalk in front of the restaurant.

Q. You were picketing at the time?

A. Yes, we were.

Q. Okay, can you please tell us how that conversation arose?

A. We was — we had been there about fifteen (15) minutes after we arrived. I think it was around 9:00 or 9:15, it was about

the time that she came on. And, this truck had stopped just inside the driveway and it asked us what we was doing. We told him we was boycotting the Big Apple. And, he said he had been there earlier that day and hadn't saw us and we —

Q. Who's he — I'm sorry to interrupt, who's he?

A. — the customer.

Q. Is that the fellow in the truck?

A. Right.

Q. All right. Please continue.

A. Okay, and we told him if he wanted to talk, park his truck and come back and talk to us. And, before he had a chance to pull away, Sherry came out and said don't block my fuckin driveways and we said we're not blocking your driveways and she said, and get the fuck off my property. And, I said I'm not on your property, but if it will make you happy, you know, we've been walking across the driveways, not stopping and then walking back, and I said, if it will make you happy we'll stay right here in front and not cross the driveways. And, she said, you might think you're funny, but I intend to have the last laugh. And, she said, I will get even with you for what you're doing to us. And, I said, don't threaten us, Sherry. And then, she walked across and she had a paper and she said to Debby Makey, who the hell are you. And Debby said, I'm Debby Makey, I used to work here. And then she said to Dale, and who are you. And, Dale told her her name and she said, you're going to all pay for this. And, she said, and Debby, you and Dale as my witness, Ruth I'll get even with you if it's the last thing I do. And I do intend to have the last laugh. And, I just told her don't threaten us again. And, she started back across the parking lot. And, she stopped about half way across and looked back, and she said, is these your right names, I think is what she said. And, I said yeah, and there's some more coming down, do you want their names too. And, she said, no this will be enough. And, then she went on inside.

Q. Were you laughing at the time?

A. No, I wasn't laughing. I was scared.

Q. I'm sorry I didn't hear you?

A. I said, she scared me.

Q. Okay, you testified that you had been walking across the driveways, and you had been walking on the sidewalk. Does the sidewalk continue across that driveway?

A. Yes.

Q. How many driveways are there there?

A. Two (2).

Q. Okay, and when you walked across the driveway, did you walk across on the sidewalk or off the sidewalk?

A. On the sidewalk.

Q. On the days that you picketed the Bill Johnsons by the way did you picket other Bill Johnson's restaurants besides this one?

A. After, yes we did.

JUDGE JENSON: Let me ask one here. On the time that you picketed on September 18th that you related here, were you handbilling?

THE WITNESS: Well, I think first it was the 20th, no we didn't handbill.

BY MR. PETTIBONE:

Q. Okay, did you handbill?

A. Yeah, we did.

Q. When?

A. The 22nd.

Q. Is that the first time you handbilled?

A. Yes.

Q. And did you handbill on any occasions after that?

A. The 22nd and the next following Tuesday.

Q. Okay, and have there been any other occasions that you handbilled that you can recall?

A. Since — I'm not sure which day we had the hearing on the TRO, but we did two (2) days after that.

Q. About when, what month?

A. It was in November.

Q. And, you say the hearing of the TRO, is that when did you first find out about the TRO?

A. TRO?

Q. Yes.

A. I found out about it Monday, the 25th of September.

Q. And, when you say the hearing on the TRO, you're referring to that date?

A. No, I'm talking about after we went to Court on it, which was in November.

Q. Okay. Ruth, I'm going to show you Respondent's Exhibit No. 1 and ask you is that a copy of the handbill that you distributed?

A. Yes, it is.

Q. Thank you. You testified that you picketed on the 20th. Did you picket on the 21st? Of September?

A. Yes.

Q. How about the 22nd?

A. Yes.

Q. How about the 23rd?

A. No.

Q. How about the 24th?

A. No, not on the weekend.

Q. Okay, how about the 25th?

A. No, we didn't picket that day either.

Q. Why not?

A. We got sued that day.

Q. How did you find out about the sued?

A. Larry Katz called me at home. Okay, first Carla had called.

Q. Carla who?

A. Carla Marie Scott.

Q. Okay, about what time did she call you?

A. It was about — I think about ten till eleven.

Q. Okay, what time did Larry Katz call you?

A. I think it was about ten after eleven somewhere around there.

Q. Okay, why don't you tell us what he said to you. Excuse me, yes, on the phone. Go ahead.

A. Well, he said that there was going to be a hearing in Judge Rudell's [sic] Court and he gave me the courtroom and the number or whatever, and I think he asked me if I had a pen and was writing it down and I said, no wait a minute, I'll get one, and I got one.

Q. Did he say when that hearing was?

A. He said it was for 12:00 o'clock.

Q. What day?

A. That day.

Q. Please continue.

A. And, I think that's when I said, is that today, and he said, yes. And, I said something about what would happen if I couldn't make it, and he said, could I get a hold of my husband and could he make it. That he was a defendant in it too.

Q. Who said that?

A. Mr. Katz.

Q. Okay, please continue.

A. And then he said, did I want to know who the defendants were. And, I said, yeah, okay. So, he read them off the nine (9) defendants, Barbara Orr, Larry Orr and I guess — when he read off all of the defendants, I recognized them as being the ones that picketed but I didn't say anything and he said, anything else. And, I said you shouldn't be scaring those girls like that. And, he said, aren't you. And, —

Q. Was that in response to your statement that come right after in time?

A. Yeah.

Q. And, what was that again?

A. Aren't you.

Q. What else was said?

A. I said, no. And, he said, any more questions, and he said do you think you could get a hold of your husband and I said, yes, I think I can. And, he said thank you very much and he hung up.

Q. Okay, did you attend the hearing at 12:00 that day that he spoke of?

A. No, I didn't.

Q. Why not?

A. Cause I just got out of the shower. My hair was wet and it's like a forty-five (45) minute drive almost to downtown from where I live on 19th Avenue, and there was no way I could have made it.

Q. I assume then that the courthouse is downtown?

A. Pardon?

Q. I assume that the courthouse is downtown?

A. Yeah, the one that he gave me. I think it was on Jefferson or one of those streets.

MR. PETTIBONE: Your Honor, I would ask if the Respondent's counsel will stipulate that this is the Ruth Helton named in the civil complaint.

JUDGE JENSON: If this is the what?

MR. PETTIBONE: The Ruth Helton named in the civil complaint, and also it's the Ruth Helton named — whose deposition is included — well, it's not in evidence yet. If it is eventually in evidence, it is the same Ruth Helton whose deposition is included in General Counsel's 2.

MR. KATZ: Yeah.

JUDGE JENSON: All right fine. Is your deposition here in total or it is?

MR. PETTIBONE: It's the portions, Your Honor. Of (h). Your Honor, I have no further questions of Mrs. Helton at this time.

[Page 103]

CROSS EXAMINATION

BY MR. KATZ [Attorney for Restaurant]:

[Pages 131–38]

Q.[By Mr. Katz, Attorney for Restaurant] Okay. Let's go to September 20th now, which is of course, after you were terminated, September 20, 1978. On that day you began your picketing and your demonstrations in front of the restaurant, correct?

A.[By Ruth Helton] Correct.

Q. Do you remember how many of you were engaged in the picketing on that day, September 20th?

A. What do you mean by engaged in the picketing? How many was there?

Q. How many were in the demonstration? How many of you participated?

A. There was me and Carla Marie Scott, and Dale Michaud, and Debby Makey and Cheyrl Nichols and Carl Nichols, and John Helton.

Q. For some period of time, at least, you were crossing the restaurant's driveways, were you not, walking back and forth on the sidewalk?

A. Yes, we were.

Q. And, there was some period of time also, was there not, when you were talking to customers who were driving in and out of the driveways? You would talk to them as they drove in and out, is that correct?

A. We said, hi, you know.

Q. You testified that on one occasion there was a truck in the entrance way in the driveway, and you were talking to the driver when Sherry Sturgeon came out of the restaurant.

A. He wasn't actually in the entrance way. He was over to the side of the entrance way.

Q. Well, was he in the driveway to the parking lot?

A. Yes.

Q. And, you were talking to him while he was in that driveway?

A. One of us was. I'm not sure if it was me or Dale.

Q. Were you and Dale both standing next to the truck at that time?

A. We were standing at that end of the sidewalk but we wasn't standing next to the truck.

Q. Anybody else besides you or Dale?

A. Debby was there, but I think she was back up the other end.

Q. On any other occasion on September 20th did you talk to customers who were going in and out of the driveways?

A. As they went in and out, you mean talk to them by what we — you mean by talk to them we said hi to them. We told them to park the car, come over and talk to us and a couple of them did. We did talk to them as they went in and out.

Q. How many of you had signs?

A. Five (5).

Q. Did you observe any of the demonstrators waving those signs in any fashion in front of people who were driving out or in the driveway?

A. No, I didn't.

Q. Did you observe any of the demonstrators lowering their signs as people would come into the driveway?

A. Only if they asked to read it.

Q. Did that occur from time to time?

A. Every once in a while someone would say, what does it say, and they'd hold it down so they could read it.

Q. And, these might be people coming in the driveway, these people you're talking about.

A. Yeah.

Q. You also continued to do picketing on September 21st, correct?

A. Yes.

Q. You engaged in the same kind of activities you've just described that took place on the 20th?

A. Yes.

Q. Do you remember an incident on September 21st when one of the demonstrators yelled Uncle Tom to one of the persons coming out of the restaurant?

A. Yes.

Q. Could you describe that incident? What took place?

A. I was at the other end of the sidewalk. You want me to describe it from the beginning?

Q. From the beginning of that particular incident, yes.

A. A lady came up and said something to Carl and my husband and they said let me see the list you have, and as I started over that way, a lady said she didn't want to see any damn list and she went on into the restaurant. And, I said, what was that all about, and they said, she just said that she didn't think the Big Apple was prejudice. And, then a couple of minutes later, she came to the front door and she had her little black busboy and I understand her to say, does this look like prejudice to you. And, one of the girls yelled Uncle Tom.

Q. And, who was that who yelled Uncle Tom?

A. I think it was Cheryl Nichols.

Q. Was she one of the defendants subsequently in the lawsuit?

A. Yes, she was.

Q. On September 22nd, you also engaged in picketing right?

A. Yes, we did.

Q. And, on September 22nd you began distributing the leaflets that has been introduced as Respondent's Exhibit 1?

A. Yes.

Q. Do you know roughly how many of those leaflets you distributed?

A. I'm not sure. I think we took about a hundred (100). We may have passed out eighty (80) or ninety (90) I'm not sure.

Q. And, you distributed that leaflet on subsequent occasions, also?

A. Tuesday morning for an hour.

Q. Which was after the lawsuit was filed?

A. Yes, it was.

Q. And, in fact you distributed that leaflet again, just a few weeks ago, or several days ago?

A. Yes.

Q. The incident you described which — with Sherry Sturgeon according to your testimony she said among other things, I'll have the last laugh. You'll all pay for this, and so forth. Other than the demonstrators, was there anyone around who might have heard her make those statements?

A. No, there was only three (3) of us there at the time.

Q. Other than that one particular incident, did you ever speak to Sherry Sturgeon again during your demonstrations?

A. No, I didn't.

Q. Did any other representative of management or agent of management make any similar statements or quote, threats, unquote, to you? Similar to the one made by Sherry Sturgeon?

A. No.

Q. That was the only occasion on which it happened?

A. To me, yes.

Q. You testified that you got notification from me that a hearing was going to be held in Judge Rudell's [sic] Courtroom at about 12:00 o'clock on, I forget the day it was — November 5, I believe?

A. Correct.

Q. How —

MR. PETTIBONE: Objection, Your Honor. That's not what the testimony was. September 25th.

BY MR. KATZ:

Q. I'm sorry, September 25th. You received a telephone call from me telling you that the hearing was going to be held at 12:00 o'clock. You said before you received the phone call from me, you got a call from Carla Scott. Did she tell you that she had been notified? By me, about the lawsuit?

A. She said she had to go to Court, yes.

Q. Did she tell you she'd been notified by me?

A. Yes.

Q. And, did she say anything about the conversation I had with her?

A. Just that it was something about a TR something and she didn't really know what it was and she didn't really know what was going on.

Q. All right. But other than that, she didn't say anything about my conversation with her?

A. I don't think so.

Q. Okay. You did not appear at that hearing on the 25th did you?

A. No, I didn't.

Q. But your husband was there, was he not?

A. Yes, he was.

Q. Do you know who else was there?

MR. PETTIBONE: Objection, Your Honor. She wasn't there, how does she know?

MR. KATZ: Well, the witness has not said that she doesn't know. If she doesn't know, well, she can say that. But, I presume she's —

JUDGE JENSON: Well, he asked do you know who else was there, and then I suppose we'll find out how she know. Okay.

A. I know who they said was there.

Q. Did John tell you he was there?

A. Yes, he told me.

Q. And, did he tell you who else was there?

A. He told me that Carla Marie Scott and Debby Makey was there.

[Pages 215–16]

THEREUPON,

DALE MICHAUD

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Give your name, spell your last name and give us your home address.

THE WITNESS: Dale Michaud, M-I-C-H-A-U-D 1816 North Staton Street.

JUDGE JENSON: All right off the record.

(Discussion off the record.)

JUDGE JENSON: Back on the record.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Dale, have you ever worked for Bill Johnsons Restaurants?

A. Yes.

Q. Where?

A. Down on Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes.

Q. Starting when?

A. I think it was in February of '78.

Q. Until when?

A. Till September of '78.

Q. Do you remember what day in September?

A. The 18th, I think.

Q. In what capacity did you work?

A. Waitress.

[Pages 227–230]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th, of this year. What did you do that day?

A.[By Dale Michaud] Picketed.

Q. Who's we?

A. It was Debby Makey, Cheryl Nichols, Carla Scott, Ruth Helton and myself.

Q. Did all of those people that you mentioned picket in — at the same time during the day?

A. No.

Q. Where did you picket that day?

A. The Big Apple on Van Buren.

Q. Okay, and you had picketed a Bill Johnsons Restaurant before?

A. No.

Q. That day, did you have any conversations with any Bill Johnsons supervisor?

A. Yes.

Q. When was that?

A. It was about half hour after we were out there picketing.

Q. About what time of day is that?

A. 9:30.

Q. Which supervisor did you have a conversation with?

A. Sherry Johnson.

Q. And, who was picketing at that time?

A. There was Debby Makey, Ruth Helton and myself.

Q. Was anyone else present during that conversation?

A. Two (2) customers. We were talking to.

Q. Where were they?

A. They were in the driveway.

Q. Were they standing there?

A. No, they had a truck. They were parked in the driveway.

Q. Can you tell us what was said in that conversation?

A. Well, we were talking to the customers and Sherry came up behind us and told us that we weren't supposed to be blocking her driveway, so we turned around and walked away. And, then she followed us and she says, —

Q. Go ahead tell us exactly what she said.

A. She said, what the fuck are you guys doing. So, we didn't say nothing to her and she says, you fuckin guys think you're funny. And, she looked at Ruth and she told Ruth that she was going to pay for what she was doing to her, what Ruth was doing to them and I told her, I said, well, Sherry you don't have to swear at us. And, she looked at Debby because she thought Debby Makey had said that, and she said, who the hell are you. And, Debby told her and she said — she pointed at Debby and I and she said, you two are my witnesses for what's going to happen. Then she said she'd get the last laugh.

Q. Who'd she say that to?

A. To all of us, I guess.

Q. Did she say what was going to happen?

A. No, she didn't.

Q. What happened after that?

A. She turned around and walked away, and then she gave us the finger and walked inside the building.

Q. When you say gave us the finger, what do you mean? You don't have to show us, but what do you mean?

A. Well, she put her middle finger up.

Q. Okay, and where was she at the time?

A. She was in the middle of the parking lot.

MR. PETTIBONE: Will you stipulate that this Dale Michaud is the Dale Michaud named in the civil complaint and whose deposition was also taken in that case?

MR. KATZ: We will stipulate.

BY MR. PETTIBONE:

Q. Have you seen the civil complaint filed against you and other defendants?

A. Yes.

q. By Bill Johnsons Restaurants?

A. Yes.

Q. When you saw that complaint for the first time, did you have a reaction to it?

A. Yes.

Q. What was your reaction?

A. I was really scared and I didn't really know what was going on. And, I just thought I'd go to jail or something.

[Pages 239–40]

Q.[By Mr. Katz, Attorney for Restaurant] Were you aware that the handbill, Respondent's Exhibit 1 which I am now showing you, which the Judge is giving you a copy of, were you aware that this was going to be distributed on September 22nd?

A.[By Dale Michaud] Well, Ruth had called me on the phone and she told me the things we had marked down and I agreed to them, like you know when they were going to be distributed.

Q. Had you ever been the object of unwarranted sexual advances?

A. No, but I had heard.

Q. The question was whether you have ever been the object?

A. No.

Q. All right, and did you tell Ruth that?

A. Yes.

[Pages 247–48]

CHERYL NICHOLS

was called as a witness by and on behalf of the General Counsel and after having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name?

THE WITNESS: Cheryl Nichols.

JUDGE JENSON: And, spell your name for us.

THE WITNESS: C-H-E-R-Y-L, N-I-C-H-O-L-S.

JUDGE JENSON: And, your home address, please.

THE WITNESS: 15601 North 19th Avenue.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Cheryl, have you ever worked for Bill Johnsons restaurants?

A. Yes, I have.

Q. Where?

A. On East Van Buren.

Q. That's 3757 East Van Buren?

A. Yes, it is.

Q. In what capacity did you work there?

A. I was a waitress.

[Page[illegible]59–60]

Q.[By Mr. Pettibone, Attorney for F[illegible]rd] Calling your attention to September 20th of this year, wha[illegible]id you do that day?

A.[By Cheryl Nichols] I picketed the restaurant.

Q. What restaurant?

A. On East Van Buren.

Q. Bill Johnsons restaurant?

A. Yes.

Q. The one you used to work?

A. Right.

Q. Did you picket alone?

A. No, I did not.

Q. Who did you picket with?

A. Carla Scott, Dale Michaud, Ruth Helton, Debby Makey and my husband, Carl.

Q. Were you there all day?

A. I was there — I believe I arrived at around 11:00 o'clock.

Q. Had you picketed a Bill Johnsons restaurant before?

A. No.

Q. Did you picket other days?

A. Yes, I did.

MR. PETTIBONE: Will you stipulate that this Cheryl Nichols is the Cheryl Nichols named as the defendant in the lawsuit?

MR. KATZ: This is the Cheryl Nichols.

MR. PETTIBONE: All right.

[Pages 299–304]

CARL NICHOLS

was called as a witness by and on behalf of the General Counsel and after having been first duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Give us your name, spell your name and your home address, please.

THE WITNESS: My name is Carl Nichols, N-I-C-H-O-L-S. I live at 15601 North 19th Avenue, Space Number 164. That's Phoenix, Arizona.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Carl, are you related to Cheryl Nichols?

A. Yes, sir. I am her husband.

Q. And, calling your attention to September 20th of this year, what did you do that day?

A. I was involved in a picket in front of Bill Johnsons Restaurant on East Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes.

Q. Were you alone?

A. No, I was not.

JUDGE JENSON: Are you an employee or have you been an employee of the — Big Apple, is that what it is?

THE WITNESS: No, sir.

BY MR. PETTIBONE:

Q. Who else was with you when you were picketing?

A. Ruth Helton, my wife, Cheryl, Dale Michaud, Debby Makey and Carla Scott.

Q. Did you and Cheyrl [sic] arrive there together that day?

A. Yes, we did.

Q. Had you picketed a Bill Johnsons restaurant before?

A. No, sir.

Q. Did you picket any Bill Johnsons restaurant on any subsequent occasions? That is later occasions?

A. Yes, sir.

Q. Do you know some of the Bill Johnson supervisors?

A. Yes, sir. I do.

Q. Have you had any conversations with any Bill Johnson

supervisor, excuse me, on that day did you have any conversations with any Bill Johnson supervisor about the picketing?

A. Yes, sir, I did.

Q. With whom did you have the conversation?

A. With Jean Johnson.

Q. When?

A. It was approximately 3:30 in the afternoon.

Q. Where were you?

A. I was in the living room of my house.

Q. And, how did she happen to talk to you. That is was she there?

A. No, she talked to me over the telephone.

Q. Who called who?

A. Jean called me.

Q. Okay, would you please relate to us that conversation?

A. Sure. My wife Cheryl answered the phone. She handed it to me and said there is a lady that would like to talk to you. And, I asked her who it was, and she said, she didn't know. I answered the phone and the voice identified themselves as Jean Johnson. And, she asked how I was doing. I said fine. And, she said, why were we out in front of her restaurant that day. And, I said because of Ruth's firing and the girls felt that they weren't being treated fairly. And, —

Q. Do you recall anything else in that conversation?

A. Yes, she said I've always been fair to all of my girls.

Q. Okay, what was said after that if you recall?

A. I said I don't believe it's you that they're upset with. And, she said, who are they upset with, then. And, I said with Johnny Johnson and some of the other managers. And, she asked why. And, I told her because of the way Johnny conducted the July 25th meeting of 1978. And, I then told her that he told the girls that if he didn't like the earings they wore that he could fire them. And, that he referred to them as peons.

Q. In telling this to Jean Johnson, did you say when Johnny Johnson supposedly made this remark?

A. I'm sorry, could you repeat the question?

Q. Yes. In telling that to Jean Johnson, in telling her what Johnny Johnson had said, did you tell her when he supposedly made that remark?

A. Yes, I told her it was at the meeting on July 25th.

Q. Do you recall anything else said in that conversation?

A. Yes, we — she said that she would hate to see us lose that new home we bought, on one occasion. She said that she would sure hate to see — excuse me. She said that she would hate to see us get hurt by all of this. She said that twice during the conversation. She also said that she was going to take over management of the restaurant.

Q. Did she mention your wife in that conversation?

A. Yes, I believe she did.

Q. Do you recall in what context your wife's name was mentioned?

A. I believe she said that she felt she was a very sweet girl.

Q. Did she mention Ruth Helton in that conversation?

A. Yes, she did.

MR. KATZ: Your Honor, I think that the last several questions have been leading questions. I think that general Counsel should ask what was said in the conversation by whom to whom and not lead the witness down every subject that was in the conversation or not in.

MR. PETTIBONE: Your Honor, I asked a number of that type of question, what was said and I think I've adequately exhausted the witness's recollection on that.

JUDGE JENSON: Overruled, go ahead.

BY MR. PETTIBONE:

Q. What was said about Ruth Helton?

A. She said that Ruth had nothing to worry about. That her husband could support her.

JUDGE JENSON: Well, how did the subject of Ruth come up?

THE WITNESS: When she said that she would — I believe when she said that she would hate to see us get hurt by all of this.

JUDGE JENSON: Go ahead.

BY MR. PETTIBONE:

Q. Do you recall anything else during that conversation?

A. Not at the present time, no.

Q. Do you recall what preceded the remark about your house?

A. No, I do not.

Q. Can you tell us if that was in the beginning or the end of the conversation or the middle?

A. It was in the middle of the conversation, as I remember.

MR. PETTIBONE: Will you stipulate that this Carl Nichols is the same Carl Nichols in the civil suit as named defendant whose deposition was also taken?

MR. KATZ: Yes, I will.

MR. PETTIBONE: Okay, that's very kind of you.

[Pages 306–09]

Q.[By Mr. Katz, Attorney for Restaurant] Was the conversation cordial?

A.[By Carl Nichols] Yes, it was.

Q. Pleasant and friendly?

A. She seemed slightly upset when she was first talking to me but as the conversation went on she seemed to be calming down a little bit.

* * * * *

Q. From the whole tone of the conversation did you get the idea that she was trying to smooth over things and hopefully get

any kind of demonstrations or whatever to diminish against the restaurant?

A. Yes.

Q. Did she express concern for how the situation might effect you and Cheryl?

A. No, except for the fact that she said she would hate to see us get hurt, by all of this.

Q. Did you understand that concern as expressed in that statement to be genuine concern?

A. I'm not sure how she meant it.

Q. How did you think she did?

A. I had mixed feelings about it.

Q. Well, I mean did you go on and say, oh, sure common [sic], you don't mean that, you're just trying to get us. Or, did the conversation proceed in an more pleasant fashion?

A. The conversation proceeded, yes, in a pleasant fashion.

[Pages 317–18]

THEREUPON,

CARLA SCOTT

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name, spell your name for us and your home address, please.

THE WITNESS: My name is Carla Scott, C-A-R-L-A S-C-O-T-T. My address is 1050 North 46th Street, D43.

JUDGE JENSON: Keep your voice up, Miss Scott so we can all hear you.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Carla, have you ever worked for Bill Johnson's Restaurants, Inc.?

A. Yes, I have.

Q. Where?

A. It was on the east side, on Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes, it is.

Q. When did you first start working there?

A. It was in August of '77.

Q. And, when did you last work there?

A. September of '78.

Q. Do you recall what day in September?

A. The 18th.

Q. In what capacity did you work there?

A. As a waitress.

[Pages 328–30]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th of this year, what did you do on that day?

A.[By Carla Scott] We started boycotting the Big Apple Restaurant.

Q. When you say boycotting what do you mean? What did you do?

A. We carried signs on the sidewalk there.

Q. Okay, the sidewalk where?

A. In front of Bill Johnsons.

Q. The same one we've been talking about?

A. Right.

Q. Okay, and who is we?

A. Debby Makey, Cheryl Nichols, Cheryl did not come until later, Dale Michaud, Ruth Helton and I.

Q. About what time of day did you start to, as you say, boycott the Big Apple?

A. We started at 8:00 o'clock.

Q. And, at the time — well, strike that. Had you ever picketed a Bill Johnson's Restaurant before?

A. No.

Q. Were you — did you stay at that restaurant during the entire time other people were there as far as you know?

A. Yes. Except for one time I left for about an hour.

Q. Okay, do you recall when you left?

A. I believe it was around 9:00 o'clock.

Q. Did you picket any Bill Johnson's restaurants prior to this day?

A. No.

Q. And, have you picketed any Bill Johnson's restaurants after that day?

A. Yes.

Q. Did you do anything besides picket on any of those days?

A. We handed out handbills.

Q. Okay, do you recall approximately how many times you did that?

A. I believe it was two (2) times, two (2) or three (3) times.

[Pages 338–40]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the lawsuit was filed in State Court by the restaurant against those who demonstrated?

A.[By Carla Scott] Yes. I don't remember what day it was, no.

Q. Do you recall being notified?

A. Yes.

Q. Being notified before the first hearing in that lawsuit that it was going to be a hearing?

A. Yes.

Q. Do you remember who notified you?

A. You did, I believe.

Q. By me, you mean Larry Katz, attorney for the Respondent, right?

A. Right.

Q. And, was there anything particular about that conversation that stays in your mind?

A. Just that I was to be at court at 12:00 o'clock for the hearing or what —

Q. Was I courteous and polite during the conversation?

A. Yes.

Q. Was there any indication in the conversation that I was trying to frighten you or anything like that?

A. Not really.

Q. Okay. Did you then call Ruth Helton after that conversation with me?

A. Yes.

Q. And, you told her what had happened?

A. Yes.

Q. Did you appear at that hearing?

A. Yes.

Q. And, did you testify at that hearing?

A. Yes.

Q. And, that was the only period in which Judge Rudell [sic] was deciding whether or not she was going to grant a Temporary Restraining Order against certain aspects of the conduct of the demonstrators, right?

A. Right.

Q. And, who else was at that hearing for the defendants?

A. Debby Makey, and John Helton.

Q. John Helton is Ruth Helton's husband?

A. Right.

A. And, did they all testify?

A. Yes.

Q. And, in fact a Temporary Restraining Order was issued by the Judge after that, was it not?

A. Yes.

[Pages 663–64]

LOIS WILLIAMS

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated, and state your name, please?

THE WITNESS: Lois Williams.

JUDGE JENSON: Your home address, please?

THE WITNESS: 2825 East Cara.

JUDGE JENSON: Go ahead.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Miss Williams, are you now or have you been related to Rudy Johnson, one of the owners of the Big Apple Restaurant?

A. Yes, I was.

Q. And, what was the relationship?

A. I was his wife.

Q. Now, we've used the names Lois Johnson and Lois Williams interchangeably in this hearing in the past. We'll refer to you as Lois Williams? Okay?

A. Okay.

Q. Are you currently employed?

A. Yes, I am.

Q. And, by whom are you employed?

A. Bill Johnson's Restaurants.

Q. Howlong have you been working for the restaurant now?

A. Approximately ten (10) years.

Q. Are you in a supervisory or managerial capacity?

A. Yes, I am.

[Pages 679–84]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the picketing began in front of the Big Apple Restaurant?

A.[By Lois Williams] I believe it was approximately September 20th.

Q. 1978?

A. Yes, sir.

Q. And, did you observe the picketing?

A. Yes, I did.

Q. Would you tell us what you observed on September 20th with regard to the picketing and demonstrations?

A. I observed the girls walking in front, tipping their signs in front of cars. Cars had to stop because they couldn't — they had to stop in order to read the signs and they would move the signs. I observed them going into the driveway to discuss — to talk to people in cars. I observed a delivery truck that had to stop because a car was stopped in front of it.

Q. All right, now let me ask you to be a little more specific about the whos and the whens and so forth. Who did you see participating in the picketing and the demonstrating on September 20th?

A. Ruth Helton, Carla Scott, Debra Mackay, Dale Michaud and Cheryl Nichols arrived later.

Q. All right. Was there any males involved in the picketing?

A. Yes, sir. Carl Nichols and for a brief time, John Helton.

Q. Now, you described the picketers dipping their signs in front of cars coming into the driveway. Who did you observe doing that and on how many occasions? On September 20th?

A. I observed Ruth doing it, probably —

Q. Who?

A. Ruth.

Q. Ruth Helton.

A. Ruth Helton doing it twice and probably Carla doing it twice.

Q. You described a delivery truck that had to stop before it go into the driveway, could you be a little more specific about that incident? What caused the truck to stop and what you observed?

A. There was a car stopped in the west driveway. I don't remember what type of a delivery truck. I believe it was linen, but the car was stopped in the driveway. There wasn't any way for the delivery truck to get around the car. They were talking to the driver of the vehicle and the delivery truck could not get into the driveway, until they were through talking and the car moved.

Q. About how long did that take?

A. Oh, maybe two (2) or three (3) minutes.

Q. All right. Based on your personal knowledge, would you describe the traffic and the pedistrian situation that customarily exists in front of your restaurant on Van Buren?

A. Well, it's very heavy.

Q. It's very heavy with what?

A. Traffic and pedistrian.

Q. Why is it heavy with pedistrian traffic there? Does it have something to do with the area? Would you describe the area?

A. Yes, we are right next door to the Ramada Inn. The Ramada Inn Executive Offices are across the street, which constitute a lot of foot traffic. It — the restaurant is set between numerous motels. There's a Ramada Inn on one side. The Arizona Palms on the other. And, other smaller hotels along Van Buren. The tourists or even not tourists, a lot of people that work for us or have worked for us

in the past, lived in these places. Don't have vehicles and will walk along the sidewalk.

Q. You have two (2) driveways, leading to the restaurant, do you not?

A. Yes, sir.

Q. How much sidewalk space is there between the two (2) driveways, do you know approximately?

A. Sixty (60) feet.

Q. Sixty (60) feet worth. Are there any kind of greenery or shrubs along the side, the sidewalks?

A. Yes, there are. There's the Van Buren beautification plan they put in there are trees and shrubs between the edge of our property, the sidewalk and the street.

Q. Now, in coming and going from work, you drive in and out of those driveways, right?

A. Yes, I do.

Q. Do those shrubs and trees effect driver's ability to see the streets at all?

A. Yes, they do.

Q. Did it effect your ability did you observe that?

A. Yes, it does.

Q. In what way?

A. The manner in which the trees are placed forces you to — if you're leaving from the west driveway, you have to pull out alr ost into traffic to be able to see around the trees, which puts you just right on the edge of traffic to where you're blocking — actually you're blocking the sidewalk but enable [sic] to see. Also, on the other side, is the Ramada Inn that has a very large bogenvia [sic], I believe it is, and you have to pull out a little farther to see in the other direction.

Q. All right, now when you have driven in or out of those driveways, is your ability to see up and down the street effected at all by pedestrians on the sidewalk?

A. Yes, it is.

Q. In what way is it affected?

A. Well, it's obstructed if there's pedestrians you know, the little bit of leeway you have for the shrubbery then if a pedestrian is there also, then it is obstructed that much more.

Q. Now, you know a lawsuit was filed by the restaurant on or about September 25, 1978?

A. Yes, I do.

Q. Did you participate at all in the decision to file that lawsuit?

A. No, I did not.

MR. KATZ: That's all for me, Your Honor.

CROSS EXAMINATION

[Pages 690–92]

Q.[By Mr. Pettibone, Attorney for Board] We testified to having seen vehicles stopped in the driveway —

A.[By Lois Williams] Yes, sir.

Q. And the pickets talking to the occupants of vehicles.

A. Yes, sir.

Q. Such vehicles parked in the driveway. Did you see any of those vehicles actually stopped?

A. Yes, sir.

Q. How many?

A. Ah, four, approximately.

Q. And the occupants then talked with the pickets?

A. Yes, sir.

Q. At the time you were making your observations and were watching the pickets Rudo [sic] Johnson was watching the pickets as well, was he not?

A. Yes, sir.

Q. And he was out in front near the sidewalk watching the pickets, was he not?

A. Yes, sir.

Q. That was the entire time you were watching he was also watching, is that correct?

A. I believe so, except he was also watching during the lunch hour when I was busy inside the restaurant.

Q. You testified that the girls were out in front, walking in front. I assume you mean on the sidewalk.

A. Yes, sir.

Q. Could you tell if customers were reading the signs when the girls were dipping them?

A. Yes.

Q. I take it that the signs as they were being carried by the girls would have been higher than the roof of the vehicles unless they were dipped, is that true?

A. Yes, sir.

JUDGE JENSON: When you speak of dipping, you mean they were holding the sign up vertically and then they just lowered it vertically?

THE WITNESS: No, sir. They would — the cars would pull in the driveway. They would tip them towards the cars.

JUDGE JENSON: Towards the cars, or over the cars, or what?

THE WITNESS: On occasion towards the cars to where the drive would be — there would be no way that the driver could not read the sign. Occasionally they would put them down so low that the cars would have to stop.

BY MR. PETTIBONE:

Q. It's your testimony that those signs were placed on occasion in front of those cars?

A. Yes, sir.

Q. How many times?

A. Maybe two (2), thr-e (3) times.

Q. Who did it, who was the picket?

A. I believe Ruth Helton did it on one occasion with the delivery truck. That's why the delivery truck could not get in. That's why I specifically remember that incident.

Q. It wasn't in front of the delivery truck was it?

A. No, it was in front of a car that was in front of the delivery truck.

Q. All right, What other picket?

A. Cheryl Nichols, on the opposite end.

[Pages 702–03]

SHERRY STURGEON

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated. Your name, please and your home address.

THE WITNESS: Sherry Sturgeon, 8205 North Second Drive.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Sherry, what is your current employment?

A. What is my employment?

Q. Yes.

A. I'm employed at Bill Johnson's Big Apple.

Q. In what capacity?

A. Manager.

Q. Are you a member of the Johnson family?

A. Yes, I am.

[Pages 712–16]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the picketing began in front of the Big Apple Restaurant eastside?

A.[By Sherry Sturgeon] It was September —

Q. There's a calendar there if you need help to refreshen your recollection.

A. It was September the 20th wasn't it.

Q. Is that when you believe it was?

A. Yeah.

Q. Did you observe the picketing going on?

A. Yeah.

Q. When was the first time you observed picketing?

A. Well, one of the waitresses were coming on duty and one of the girls drawed it to my attention. She said what is going on out front. And, I said I don't know, has there been an accident? And, so I got up and looked out the window and I noticed the three (3) girls with the signs.

Q. And, what did you do?

A. I came back and called Larry Katz.

Q. That's me.

A. Right.

Q. And, you and I talked on the phone about it?

A. Right.

Q. And, what did you do then? During or after our phone conversation with respect to the picketing?

A. I went out to read what the signs said and to find out who the three (3) girls were because I didn't recognize one of them.

Q. Why did you do that?

A. At your request.

Q. And, what did you observe when you went out there?

A. They had a car blocking the driveway.

Q. Can you be a little more specific about who the they was and what you saw?

A. Dale Michaud, Debby Mackay and Ruth Helton were all three (3) standing and there was a car stopped right in the middle of the driveway. And, they were talking to the man inside the car.

Q. And, what did you do?

A. I went over there and told them to get out of the driveway.

Q. Did you use profane language?

A. Yes, I did.

Q. Did you swear?

A. Yes, I did.

Q. What was your reaction when you saw them in the driveway talking to the truck driver?

A. Well, it made me mad because they had the driveway blocked and they had a sign that said we were unfair management.

Q. Was there a further exchange between yourself and the picketers at the same time?

A. Yes, we had a talk.

Q. Do you remember what was said by whom and to who?

A. Well, when they started walking away from the car, you know. I told them they could picket all they wanted to, just to say — don't block the driveway. They started moving out of the driveway in front of the building on the sidewalk. And, Ruth was holding that sign out, sort of waving it back and forth, like some horse in a parade grinning from ear to ear. And, it made me mad. And, I told her she thought she was so funny, we would see who would have the last laugh.

Q. Did you make any statement with regard to getting even with Ruth?

A. No.

Q. You don't remember that?

A. No.

Q. Did you talk to the picketers again on any subsequent days of picketing?

A. Not, that was the only day I talked to them.

Q. Did you see them picket later that day also? On the 20th.

A. Just that day.

Q. Did you see them picket on the 21st?

A. No.

Q. Did you see them picket on the 22nd of September?

A. No, the 20th was the only day I saw them.

Q. That was the only confrontation of any kind you had with the picketers?

A. Yes.

Q. Did you participate at all in the decision to file a lawsuit against the demonstrators on September 25th?

A. No.

Q. You didn't have any participation in that decision at all?

A. No.

[Pages 725–26]

RUDY JOHNSON

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name and home address please?

THE WITNESS: My name is Rudy Johnson, 6825 North 8th Avenue.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Rudy, what is your position and responsibility with the Big Apple Restaurant?

A. I'm the Executive Vice President and in charge of the whole operation really.

Q. And, how big is your operation?

A. We employ a little over four hundred (400) employees.

Q. And, how many different restaurants?

A. Four (4).

Q. What kind of a clientelle do you get at these restaurants?

A. Mostly families, lot of tourists, lot of foot traffic, lot of locals, everybody in general. The restaurant is very successful.

Q. How many Johnson family members are there who participate in the management of the restaurants?

A. There's me, my brother, my two (2) sisters and my mother, and Don Kalfus is a shareholder.

Q. He's not a member of the Johnson family?

A. No.

Q. You and your brother Johnny and Don Kalfus are the only male members of the group in management?

A. That's right.

Q. As far as ownership and management?

A. Owner managers, yes.

[Pages 741–50]

Q.[By Mr. Katz, Attorney for Restaurant] Now, on September 20, 1978, did you observe persons picketing and demonstrating outside your premises on the east side?

A.[By Rudy Johnson] Yes, I did.

Q. How did you first become aware that such activity was going on?

A. My younger sister, Sherry, called me at home approximately 9:30 in the morning. I arrived shortly after 10:00, probably 10:15, 10:20.

Q. What did you observe when you arrived?

A. The people walking up in front of the restaurant with signs. You want the names of the people?

Q. Please.

A. Well, there was Ruth Helton, Dale Michaud, Debra Mackay, Carla Scott. Ruth's husband was there for a short period of time and I believe Cheryl's husband was there for a short period of time. I don't know exactly.

Q. How many of them were carrying signs?

A. There was about five (5) signs total, I think.

Q. Do you remember what any of the signs said?

A. Big Apple prejudiced, Big Apple rotten to its employees, Big Apple, small management, support your local waitresses, boycott, boycott this establishment, somthing [sic] along those lines.

Q. And, did you personally watch the picketers for any period of time on September 20th?

A. I watched them the whole time, after I got there until they left.

Q. And, what did you observe with respect to the picketing? What kind of conduct did you observe?

A. Well, I had called a policeman earlier in the morning to advise them of their rights.

Q. For the policeman to advise the picketers of their rights?

A. Yes, because my sister had told me she had a confrontation with them in the driveway earlier. And, from the time I watched them until 2:00 o'clock it was — they had their signs on about six (6) foot poles and they would stand at the edge of the driveways and the signs had things wrote on both sides of them. They would lower their signs down for a person to read the sign and they would flip it over so they could read both sides. Telling people to pull in the parking lot and come and talk to them. Other than that, they were just quite loud.

Q. Did you observe any impact on traffic?

A. Well, it was awfully hard to get in the driveway on different

occasions, yes. The cars would slow down to read the signs and if a car was right behind them, then the would stop in the street and wait for the person to be able to read the sign or have the exchange of words with the picketers, and then go on in. This happened through our lunch period and through our lunch period the parking lot fills up.

Q. Did you observe any picketing on September 21?

A. Yes, I did.

Q. What did you observe and who did you observe on that day?

A. Well, that day they started about 5:00 or 5:30 and they lasted until about 8:00.

JUDGE JENSON: A.m.?

THE WITNESS: This was in the evening.

BY MR. KATZ:

Q. Who did you see there?

A. Ruth Helton, John Helton, Cheryl Nichols, Carl Nichols, Carla Scott, I believe was there, Dale Michaud was not there. Debra Mackay was not there.

Q. Any children?

A. Yeah, there was a couple of small children.

Q. Do you know who they were?

A. I have heard that one of them was Ruth's son. I don't know that to be a fact, but that's what they told me.

Q. What kind of conduct did you observe during this demonstration?

A. Well, this was probably one of their loudest nights. They once again got to the edge of the parking lot — the edge of the driveway, were dipping their signs, were cheering when people would leave, a lot of cars came in and left, without going into the restaurant. One particular occasion, a woman walked out of the restaurant with one of my black busboys, and asked, so does this look like prejudice to you, and Cheryl Nichols yelled at her, Uncle Tom in a very loud voice.

Q. Where were you at the time?

A. At that particular time I was about ten (10) feet from the picketers sitting in my jeep. I had been sitting on a wagon earlier that's in front but it got a little chilly so I got in my jeep.

Q. During the conduct you've described, during your observations of this conduct on the 20th and 21st, did you say anything to the picketers and tell them to stop or anything like that?

A. No, sir, I did not. I had one word to say to the picketers and I asked them to take their drinks off the fence.

Q. Why didn't you tell them to stop what they were doing?

A. Because you had advised me of their rights. You told me they could picket. I didn't want to make the situation any worse that it already was.

Q. What happened on September 22, the next day?

A. Well, I wasn't there September 22nd, that was a Friday night I believe, that's when they passed out those leaflets.

Q. Now, you're referring to Respondent's Exhibit 1, which I will show you a copy of right now?

A. Yes, sir.

Q. And, that was the leaflet that they passed out on September 22nd?

A. Yes, sir.

Q. Did you get a copy of that on September 22?

A. Yes, sir, I did.

Q. How did you come into possession of it?

A. Well, Don Kalfus got a hold of it and I believe he brought it to my house.

Q. When was that?

A. The same night.

Q. What was your reaction to the leaflet?

A. My reaction to the leaflet was that it made me very mad. I called you on the phone.

Q. Before you get to that, let me ask you, what made you angry about the leaflet?

A. The unwarranted sexual advances. My brother Me, and Don are the only three (3) male owner managers. I take that as a personal attack upon me and Johnny and Don. A filthy restroom for women employees with no soap, paper towels or toilet tissue provided is a lie, that's the only way I can explain that one. And, this thing was put together and at the top of it it appeared to me that the National Labor Relations Board had issued a complaint against the Big Apple restaurant and so on and so forth, it's all typed in bold letters. It looked like the NLRB was condoning it or actually doing it themselves. That's the way I interpreted this thing.

Q. Did you receive or overhear any comments from customers in regard to the leaflets?

A. Through my managers, yes, I —

Q. Did persons in management report to you comments they received?

A. Yes.

Q. And, what was reported to you?

MR. PETTIBONE: Objection, Your Honor. That's heresay.

MR. KATZ: Well, it's also part of Mr. Johnson's business responsibilities to receive and act upon these comments.

JUDGE JENSON: Overruled.

A. Don Kalfus told me of one instance where some people had been handed this thing. They came inside the restaurant and was in the lobby, got to the front door, and made some remark, if you want me to repeat it, I will, and let's get the hell out of the place. And, they turned around and left. It was a party of four (4).

Q. All right, now you stated a few minutes ago that it appeared to you, looking at the leaflet that the National Labor Relations Board had something to do with it. Did you receive any comments or hear any comments from customers or anyone else on that subject?

A. Yes, I did. I had a couple of truck driving friends of mine that came up to me and asked me what was the National Labor

Relations Board getting on me about unwarranted sexual advances for.

Q. Who were the persons who said that to you?

A. Well, two (2) brothers that drive trucks between here and Albuquerque that stop at the restaurant quite frequently. Their names are Tom Edwards and I believe his brother's name is Bob.

Q. And, when did they say that to you?

A. I believe it was Saturday afternoon the day after, something like that.

Q. Now, you mentioned that you got — you earlier testified that you got in touch with your attorney after the leaflet was passed out, and that's myself, right.

A. Yeah, that's right.

Q. What was your reason for getting in touch with me?

A. I wanted to see if I couldn't get it stopped.

Q. How did you intend to instruct me to get it stopped?

A. Well, I felt as though the unwarranted sexual advances and filthy restroom and so on and so forth, was a liabless [sic] and I wanted something done about it. They were standing out there passing these out to men, women and children. They was giving them to people on bicycles.

Q. What did you instruct your attorney to do at that time?

A. After you and me talked it over, I instructed you to institute a lawsuit.

Q. Do you remember when you gave that instruction to your attorney?

A. I believe it was the next morning, wasn't it? Saturday morning.

Q. Whatever your recollection is?

A. I talked to you Friday night and then went that Saturday and worked that weekend on it.

Q. Now, General Counsel's Exhibit 2 is a collection of legal

papers, Tab No. B is listed as the Complaint. Do you recognize that as the Complaint that was filed in Court pursuant to your instructions?

A. Yes, sir.

Q. That's on September 25th, it was filed?

A. Yes, sir.

Q. That Complaint has a verification on page 9, is that your signature on the verification?

A. Yes, sir.

Q. Now, prior to the filing of this lawsuit did you review the Complaint and sign the verification?

A. I did.

Q. Refering you to page 8, of the Complaint, there is a list of kinds of relief requested for by you in this lawsuit. And, in one paragraph I'd like to direct your attention to is paragraph 5. Would you read paragraph 5 and tell us why you wanted that relief and what sort of relief you wanted?

A. I wanted them to quit passing out this pamphlet. That's the relief I wanted.

Q. Now, paragraph 5 states quote, publishing and this is part of what's sought to be restrained, publishing false and misleading statement concerning plaintiff's business officers, agents and employees, facilities or practices. Were you referring to the leaflet?

A. Yes, sir.

Q. Was there anything else you were referring to? Of just the leaflet?

A. Just the leaflet.

Q. And, the paragraph goes on to say, including but not limited to, allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case Number 28-CA-4970. What did you refer to, what did you mean by allegations misrepresenting the nature or substance of the matter pending before the Board?

A. The way this thing was written.

Q. What was it about the way that thing was written?

A. Well, the top of it was all bold letters. And, it appeared to me that the National Labor Relations Board had condoned or was behind it.

[Pages 752–73]

CROSS EXAMINATION

BY MR. PETTIBONE [Attorney for Board]:

Q. Mr. Johnson, on September 20th when you arrived at the restaurant, when you first observed the pickets, who did you observe picketing at that time?

A. [By Rudy Johnson] Ruth, Debra Mackay, Dale Michaud, Cheryl Nichols came a little later, I think. And, I don't recall the other names.

Q. Well, were there others there at that time when you first saw the picketing?

A. Let me think for a moment. John Helton was there, for a short period of time.

Q. Was he there when you first saw the picket?

A. No.

Q. Okay, that's what I mean, when you first saw it. So, when you first saw it there was Ruth Helton, Dale Michaud, Debby Mackay, right?

A. No, I believe there was one other person there, but I can't remember their name.

Q. John Helton, while he was there, didn't carry a sign, did he?

A. No.

Q. And, he was only there for about fifteen (15) minutes wasn't he? That day?

A. That's right.

Q. And, when you first arrived the pickets were on the sidewalk were they not?

A. That's true.

Q. And, you observed the pickets starting about 10:15 in the morning?

A. That's roughly, yes.

Q. Until about what time?

A. Until they left.

Q. Which was about when?

A. 2:00.

Q. And, that first day, where were you when you were observing the pickets?

A. I was sitting on an old wagon about from me to you from the pickets.

Q. And, we're talking about ten (10), twelve (12) feet, Mr. Katz?

MR. KATZ: Uh-hmm (yes).

BY MR. PETTIBONE:

Q. And, you observed them the whole time they were picketing?

A. Yes, sir.

Q. Wouldn't you say that you were the principle [sic] observer of the pickets that day?

A. Yes, I was.

Q. And, while you watched, the pickets were never in the driveway were they?

A. Physically, no.

Q. Now, you testified to seeing some pickets tipping or dipping their signs. Is that correct?

A. That's correct.

Q. The ones you saw were, correct me if I'm wrong, why don't you tell me, who did you see?

A. Ruth, and Cheryl. The first day I believe, Ruth and Cheryl on each end of the driveway. I couldn't watch them all at once.

Q. You say you saw Ruth?

A. What's that.

Q. Are you sure you saw Ruth tipping her sign?

A. I'm going to say I can't say for sure. Ruth was on the edge of the driveway with the sign. I can't recall if I saw her dipping the sign or not.

Q. The dipping of the sign didn't impede access — anyone's access to the restaurant through the driveway, did it?

A. It slowed them down. It didn't stop them totally, if you asked me if it was a toll gate type thing, it was not.

Q. All right. The pickets never stopped any of the vehicles with their signs, right?

A. The cars stopped to read the signs.

Q. All right, but the pickets never stopped any of the vehicles with their signs, right?

A. No.

Q. Okay. Police officer you called, he didn't arrest anyone there that day, did he?

A. No, he did not.

Q. And, you didn't overhear any conversations among the pickets there that day, did you?

A. The first day?

Q. Yes, the first day.

A. No. They were talking amongst themselves but I couldn't hear it.

Q. Did you hear any of the conversations between the pickets and the customers?

A. The first day?

Q. The first day.

A. No, sir, I did not.

Q. There's been testimony in this proceeding about the — there being a number of pedestrians normally in the area of the

restaurant. On that day, do you recall about how many pedestrians — well, strike that. Did any pedestrians that day have to walk off the sidewalk to get around the pickets?

A. Yes, they did.

Q. Do you recall about how many?

A. Four (4), five (5), six (6) something like that. They would come onto the parking lot and go around the pickets.

Q. That's the entire time you watched that day?

A. Yes, sir.

JUDGE JENSON: Was that because they couldn't get by or just a matter of walking around them?

THE WITNESS: Well, I can't say for sure if it was because they couldn't get by, sir. They walked into the parking lot to avoid the pickets, if this is the right word to use.

BY MR. PETTIBONE:

Q. And, let's go to the 21st. I believe you testified that you observed the picketing from approximately 5:00 till 8:00 in the evening that day?

A. Yes, sir, roughly.

Q. And, you named a number of people who were there picketing. Did some of them have — were some of them without signs? That second day?

A. I don't believe the children were carrying signs.

Q. How about some of the others. Do you recall?

A. I don't recall who was or was not. It was the same signs they had had the day before.

Q. And, that day you were the only one observing those pickets, were you not? You were the only management official observing those pickets?

A. The second day. Different people would walk out and give me something to drink. A manager would walk out and give me something to drink.

Q. But other than that, you were the one who was observing the pickets that day?

A. Yes, sir.

Q. ANd, that second day, the 21st, pickets didn't deny any vehicle or anyone access to your driveways into the restaurant did they?

A. It was a repeat of the same thing that happened the first day.

Q. So, in other words, the answer is no, is that correct?

A. They did not stop any cars from getting in the driveway, no. Coming through the driveway.

Q. And, that second day, did you see pedestrians walk off the sidewalk to get around the pickets?

A. Yes, I did.

Q. About how many?

A. Once again, I'm guessing. I guess the last time this question was asked me, four (4) five (5) or six (6), seven (7) something like that, just people walking down the street.

Q. If I told you that at your deposition in this matter, you had testified three (3) or four (4)?

A. That could be right.

Q. And, that's again I assume you saw the the pedestrians simply walk around the pickets and it appeared they were trying to avoid the pickets?

A. Yes, sir.

Q. Okay, and that second day you heard Carla Scott, one of the pickets say to the girls they were on strike, didn't you?

A. That's true.

Q. I take it you heard no other conversations among the pickets that day?

A. Only when Cheryl Nichols yelled Uncle Tom at one of my customers.

Q. Yeah, but among the pickets, among the pickets you heard no other conversation that day, right?

A. No, sir, if you're talking about between them.

Q. That's right.

A. No.

Q. Okay. Your name isn't mentioned in that leaflet is it, that the pickets distributed?

A. What's that?

Q. Your name is not mentioned in the leaflet that the pickets distributed is it?

A. No, sir.

Q. The leaflet doesn't even mention managers of the restaurant, does it?

A. No, sir.

Q. The leaflet doesn't say who, if anyone made those unwarranted sexual advances, does it?

A. No, sir.

Q. As part of the decor of the restaurant, I mean the restaurant at 3757 East Van Buren, the restaurant during working hours keeps sawdust on the floor is that correct?

A. That's true.

Q. And, is that sawdust collected at the end of the day?

A. Every night it's picked up, yes.

Q. And, at that time — well, strike that. And, I assumed it's dumped out there in the morning as well, spread around the floor?

A. Yes, sir.

Q. And, those empty sawdust bags that the sawdust comes in are then stored in the women employees restroom during the day, are they not?

A. They are put in an abandoned shower in the women's restroom, yes.

Q. Okay.

A. Along with the brooms.

Q. Anything else with the brooms?

A. Brooms and sacks to my knowledge is all that's in there.

Q. Brooms and pails and things of that nature, are they included in there?

A. Sacks to my knowledge is all that's in there. I do know the brooms and the empty sawdust bags are kept in there.

Q. Okay, you — do you ever have occasion to go into that restroom?

A. Very seldom.

Q. Okay, can you give me an idea how often that is?

A. How often I go into the ladies' restroom?

Q. Yes.

A. Well, I've been in there — over a period of how long are you talking about?

Q. Say within the last month, how many times have you been in there?

A. Within the last month, I've been in there several times.

Q. Okay, and do you go in there during working hours? During the hours that the employees are working?

A. During this past month?

Q. Yes.

A. Yes, I have.

Q. Okay, how about in July of this year, did you go into it during that month?

A. No, I don't think I did.

Q. Okay, and how about from August 1st to August 8th, did you go in at that time?

A. From August 1st to August 8th. I don't believe I was, no.

Q. Okay, how about the rest of August? Of this year?

A. Yes. I think I went in there once, or twice.

Q. Once or twice and how about September from September 1st to the 25th?

MR. KATZ: Your Honor, I'd like to ask some direction or relevance to the questions. So far we've been asked about a number of specific periods of time that Mr. Johnson allegedly went into the females' restroom. I don't see how it's related to anything in the case, yet. With my confidence in Mr. Pettibone, I'm certain it would be soon, but I'd like to know soon so I can pay attention a little bit.

MR. PETTIBONE: Would you like me to respond to that?

JUDGE JENSON: Go ahead if you like.

MR. PETTIBONE: Well, the witness has testified that the claim in the handbill that the restroom was filthy was a lie. He has an occasion to go in there and I think it's quite relevant whether or not that's true.

MR. KATZ: Thank you.

MR. PETTIBONE: Your [sic] welcome.

BY MR. PETTIBONE:

Q. Okay, September 1st through the 25th.

A. September 1st through the 25th, I went in there after I saw the handbills so —

Q. But not before?

A. No.

Q. And, you first saw the handbill on the 22nd of September?

A. That's true.

Q. Your deposition was taken in connection with the lawsuit filed on the 25th, on or about November 13th, is that correct?

A. I'm sure it is if you say so.

Q. Well, do you recall that it was?

A. Yes, I recall that I had a deposition taken, yes.

Q. And, your testimony was under oath during the taking of that deposition?

A. Yes, sir.

Q. And, didn't you testify, I'm going to use your word now, didn't you testify at that deposition, that that women employees' restroom was at times, disorientated?

A. That's true.

Q. The truck driving friends of yours, Tom and Bob, when did they make the complaint about the a — handbill?

A. It was shortly after. Exactly when I couldn't tell you. They were just going through town. Stopped at the restaurant, saw one of the handbills, asked me about it, and left.

Q. This is shortly after the handbill was distributed initially you mean. You say shortly after.

A. Yes, these handbills turned up inside the restaurant, outside the restaurant.

Q. Was this prior to the filing of the lawsuit?

A. What's that?

Q. Did they voice their concern about the leaflet to you prior to the day you filed the lawsuit?

A. I don't remember exactly. It was shortly thereafter — shortly after they were passed out. The exact date. Let me look and see if I can find the exact date for you, if that's what you want. It was close to the 25th.

Q. Of September of this year?

A. Yeah, they were traveling through town like I said. It could have been the day after or the day before. I couldn't say for sure.

Q. At your deposition, didn't you testify that you received no comments from customers or potential customers about their impressions concerning the handbill?

A. I possibly had said that yes, but I thought of a lot of things since I made that deposition. I made that deposition after I worked all night.

Q. Let me show you the document which purports to be the transcript of your deposition of November 13th, and direct your attention to page 44, lines 19 through 22.

A. Yes, sir.

Q. Didn't you testify that you had received no complaints from customers or potential customers, about their impressions concerning the handbill?

A. Yes, sir.

Q. And, at that deposition, didn't you also testify that you received no reports from any customers that they understood that the handbill meant that the National Labor Relations Board had received or issued the charges listed on the handbill?

A. Run that by me again.

Q. Didn't you testify that you had received no reports from any customers that it was their understanding upon reading the handbill, that the National Labor Relations Board had received support or issued the charges listed on the handbill?

A. I guess I did. That was — these two (2) guys were just a passing conversation.

Q. You say, yes, you did. Did you or didn't you?

A. I don't know — let me — may I see the thing. You know, I don't understand what you're asking me really.

Q. I direct your attention to page 38, line 26 through page 39 line 8.

A. Now, what was it?

Q. Page 38 line 26, that's the last line on the page to page 39 line 8.

A. That's what I said.

Q. When you say, that's what you said, you mean you did testify at that deposition that you had not received reports from any customers that it was their understanding from the leaflet that the National Labor Relations Board had received support or issued charges listed on the document?

A. No, I did not.

Q. That's what you testified, you had not received such complaints?

A. Right.

Q. And, at that deposition, didn't you also testify that the only

customer complaints you received about the conduct of the pickets was this one customer who brought the black busboy outside?

A. Yes.

Q. Mr. Johnson, I direct your attention to the six (6) items noted with asterisks toward the bottom of the handbill. Let's look at that first one. Isn't it true that the waitresses at the restaurant never had specified breaks?

A. That's true. They have no specific breaks.

Q. And, isn't it also true that if a waitress stayed after her shift was over, so that she could collect the tip from a customer, who was still eating, he had started eating before her shift was over and continued to eat after her shift was over, that she would not be paid for the time she spent after her shift was over if she stayed to collect that tip?

A. If she chose to stay, yes.

Q. Yes, she would not be paid is that what you're saying?

A. Correct.

Q. Now, let's look at the third one. Isn't it true that waitresses were threatened with dismissal if they missed too much time over the Christmas holiday season in the past?

A. There is only one way I can answer that question, sir, and that's company policy. If anybody is sick, whether it's Christmas, 4th of July, January or February, or whatever, and they're sick too much, they must bring in a doctor's excuse.

Q. Well, let me ask you this. At your deposition, didn't you testify that you were sure that waitresses had been threatened with dismissal if they missed too much time over the Christmas holiday season?

A. I don't believe I said that. Christmas or otherwise is what I said, I believe.

Q. Sir, I'm going to hand you what purports to be your deposition of November 13th, and direct your attention to page 41, line 22, and page 42, line 2.

A. That's what I said.

Q. You testified that you were sure that waitresses had been told that they would be dismissed if they missed too much time over the Christmas holiday season, right?

A. Let me see that again.

MR. KATZ: I think it's a mischaracterization of his testimony. Why don't you read the whole question and answer into the record?

MR. PETTIBONE: Sure, I'll be glad to.

JUDGE JENSON: All right, then the two (2) of you stipulate that this is the deposition recites as follows with respect to a question and answer proposed and answered by this witness, is that right?

MR. KATZ: Yeah, I'll stipulate to that.

MR. PETTIBONE: That's right. Line 22, page 41.

MR. KATZ: Okay.

MR. PETTIBONE: Question: "The phrase under the third asterisk or beside the third asterisk says waitresses threatened with dismissal. Do you have any facts to support your belief of your statement that they were threatened with dismissal is untrue? Answer: If they came in sick or got sick too often, question mark. I'm sure that was said to them." I'm sorry — I'm sure that that was said to them, there's two thats in that.

MR. KATZ: Your Honor, given the introduction of that evidence, we'd like to stand on our right now to read paragraphs of that deposition that relate to and clarify that paragraph read by General Counsel. I would like to read the question and answer that comes before that. That is on page 41, I'm sorry it begins on page 40, line 25 and goes up to what was read by Mr. Pettibone. I think without reading those lines I'm referring to, the question and answer are not clear.

MR. PETTIBONE: You want to start on page 40, line 25 to where I read.

MR. KATZ: To what you read.

MR. PETTIBONE: Go ahead.

JUDGE JENSON: What did you say?

MR. PETTIBONE: I told him to go ahead. I'll stipulate that that can be received.

MR. KATZ: Line 25 on page 40 begins as follows: "Question, by Mr. Keenan, Let's move on to the second one, waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season. I think that the earlier deposition testimony was one of the complaints was the '76 to '77 holiday season. What facts do you have to believe that that statement is untrue and outrageous? Answer: Let me once again, go to company policy. If you miss time, whether it is Christmas or otherwise, if you miss too much time, you must bring a doctor's excuse if I request that. If you miss too much time then I tell you, suppose you were working there why don't you take time off until you get your problem straightened out. I have never fired anybody or do I think any of the managers has fired anybody for being legitimately sick at Christmas or otherwise. Question: Do you have any evidence to believe that the threat was not made? Answer: Repeat that last question?" end quote. Then it picks up with what Mr. Pettibone read you.

JUDGE JENSON: Do you so stipulate?

MR. PETTIBONE: Yes, Your Honor.

JUDGE JENSON: So stipulated.

BY MR. PETTIBONE:

Q. Mr. Johnson, with respect to the fourth item on the handbill, the fourth one marked with an asterisk, inconsistent management practices, isn't it true that have been inconsistent management practices with regard to substitutions on the menu over the past year?

A. Inconsistent is such a broad term, but yes. If somebody walks in the door and wants to buy a banana, one person might charge them a dime and the next person might not know what to charge them and charge them a quarter. If you call that inconsistent, yes.

Q. And, we're talking about the managers?

A. Sure.

JUDGE JENSON: Is that the only type of inconsistent management practice that you can think of?

THE WITNESS: Well, he asked me about substitutions.

MR. PETTIBONE: Your Honor, are you asking the witnesss to tell you all the inconsistent management practices he's ever seen at the restaurant?

JUDGE JENSON: Well, I'm under the impression from his question that that is the only inconsistent practice, and are there others, that's all. It just sort of left me up in the air was all.

MR. KATZ: I think it would be fair to say that with the large number of managers we've heard about from time to time, there's bound to be inconsistent management practices.

[Page 819]

CARLA SCOTT

was called as a witness by and on behalf of the General Counsel and having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated and give us your name.

THE WITNESS: It's Carla Scott.

DIRECT EXAMINATION

* * * * *

[Pages 821–26]

Q.[By Mr. Pettibone, Attorney for Board] You have before you a copy of Respondent's Exhibit No. 1. Have you seen that document before?

A.[By Carla Scott] Yes.

Q. Have you read it before?

A. Yes.

Q. You'll note six (6) items toward the bottom with asterisks next to them. Do you believe those items to be true?

A. Yes.

Q. Do you have any reason to believe they are not true?

A. No.

Q. I want to talk about a couple of these items with you. There's one item there that says unwarranted sexual advances. Do you have any personal knowledge of what you would consider to be unwarranted sexual advances that occurred at the restaurant while you were employed there?

A. Yes.

Q. Okay, just one incident or more than one incident that you have personal knowledge of?

A. Well, it was with Don Kalfus.

Q. Is that one time or more than once?

A. It was more than once. He had asked me out a couple of times throughout the year when I was working there and then also when I was coming out of the lounge, he was going in and he hugged me and started to kiss me and I slipped underneath his arms and walked out the door.

Q. When did that happen?

A. It was during the summer time.

Q. Of which year?

A. Of '78.

Q. And, was anyone else present when that happened that you can recall?

A. Yes. There was Ruth and there was a couple of other waitresses I know, but I'm not sure exactly who they were.

Q. Are there any other incidents that you have personal knowledge of?

A. No.

Q. Okay, are there any incidents that you have heard of?

MR. KATZ: Objection, Your Honor. It calls for a heresay reply.

JUDGE JENSON: Yes or no?

A. Yes.

Q. And, who related these other incidents to you?

A. Some of the girls at the restaurant.

Q. Can you tell me which ones?

A. One of them was Mary Kay Mitchell.

MR. KATZ: Your Honor, I object to the continuation of the heresay testimony. If this is being offered for proof of the fact that unwarranted sexual advances occurred, it is heresay. If it being offered for proof of the fact that Carla Scott received such information, it's irrelevant.

MR. PETTIBONE: Your Honor, I am not offering the — this testimony to prove the truth of the facts asserted. That is that unwarranted sexual advances did occur, except for, of course, the ones where Carla Scott was personally involved. The — Mr. Rudy Johnson has testified the lawsuit was filed claiming that the handbill and this item in particular liabled [sic] the restaurant. The test under the Lymm [sic] standard, that is the Supreme Court standard which the Board accepts is whether or not the person who alleged, or persons who allege the allegedly liabless [sic] statement did so with known falsity or reckless disregard of the truth. This person in forming her belief that that element is true relied on what Respondent's counsel characterizes as heresay testimony, that is not heresay for purposes of showing whether or not she made her accusation in good faith.

JUDGE JENSON: Well, let me find out. Did you make this document up?

THE WITNESS: I did not make that, no.

JUDGE JENSON: Did you participate in making it up?

THE WITNESS: No.

BY MR. PETTIBONE:

Q. May I ask one question? Did you distribute this document while picketing?

A. Yes.

MR. KATZ: Your Honor, my response to what the General Counsel has said is that he is seeking to try the liable [sic] lawsuit under its merits.

JUDGE JENSON: Well, it seems to me —

MR. KATZ: If we go through this hearing and try and prove whether or not that was liabless [sic], we will be doing many, many hours of irrelevant work. It is not relevant to the issues before this Court.

JUDGE JENSON: This witness didn't make up this document. She didn't participate in making it up. I don't think she would be the one to testify with respect to any further to that item unless she had her own personal knowledge and I think it would be anyone else who had such advances made would be the appropriate one to testify. That's my view, so I'll sustain the objection.

BY MR. PETTIBONE:

Q. Carla, I direct your attention to the last item. The one that speaks about a filthy restroom for women employees. Do you have any personal knowledge about that item?

A. Oh, yes.

Q. Would you tell us what your personal knowledge is?

A. Well, you could go into the restroom and sometimes you would find no toilet paper, no paper towels, no soap, you know, and sometimes you'd have all three (3) but most of the time you had nothing and you'd had have to send someone out for napkins or something.

Q. Napkins to — why napkins?

A. To wipe your hands or —

Q. ANd, how often did this happen to you?

A. Quite often.

JUDGE JENSON: Well, wasn't there soap, paper towels or toilet tissue available?

THE WITNESS: I don't know, sometimes there were and sometimes there wasn't. I don't know.

JUDGE JENSON: Well, when it was, where was it kept? Do you know where it was kept?

THE WITNESS: No, I think it was kept in the back somewhere. I don't know.

JUDGE JENSON: Was this on one or more than one occasion?

THE WITNESS: This was more than one occasion.

JUDGE JENSON: Go ahead.

MR. PETTIBONE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. KATZ:

[Pages 829–32]

Q[By Mr. Katz, Attorney for Restaurant]. Do you know who's responsibility it was to clean the restroom?

A[By Carla Scott]. No.

Q. Isn't it a fact that the waitresses shared that responsibility?

A. We swept it out, and swept the lounge out.

Q. Was that done on a daily basis?

A. It was supposed to be, yes.

Q. Did you ever participate in sweeping out the restroom?

A. Oh, yes. We each had a day that we were supposed to.

Q. And, if there wasn't toilet paper or towels at some time, that was a part of your responsibility to make sure they got put in?

A. Yes, but you'd tell the busboy or something to get them, and they never would.

Q. Would that be the limit of your responsibility of cleaning the restroom, telling the busboy?

A. Pardon.

Q. Would that be the limit of your responsibility with respect to cleaning the restroom and putting in the towels and toilet paper, just telling the busboy about it?

A. Yes.

Q. And, if he didn't do it, you didn't worry about it?

A. No.

Q. Are you married?

A. No.

Q. Were you married at the time Don Kalfus asked you out?

A. No.

Q. What did he ask you to do?

A. He just asked if I wanted to go out.

Q. You mean on a date?

A. Yes.

Q. Do you consider that to be an unwarranted sexual advance?

A. Yes, I do when he was married.

Q. Was he married at the time?

A. As far as I knew, yes.

Q. You don't know for sure?

A. From what I had been told, yes, he was married.

Q. What did he ask you to do? What kind of a date?

A. Just to go out.

Q. To what?

A. He never really said. He just all he said, was well, we should go out and have a good time and — that's all. And, I'd always laugh and walk away.

Q. He did it a lot, did you say? It happened often?

A. Yes.

Q. And, you'd laugh and walk away?

A. Yes.

Q. You never took him up on it?

A. No.

Q. Did you ever file any charges with the Equal Employment Opportunity Commission?

A. No.

Q. Did you feel your job was in some way effected by your refusal to go out with Don Kalfus?

A. No.

Q. The first time you had anything to do with this leaflet was when you passed it out on September 22nd, isn't that right?

A. That's right.

[Page 833]

THEREUPON

CHERYL NICHOLS

was called by and on behalf of the General Counsel and having been previously sworn on oath was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

[Pages 836–39]

Q.[By Mr. Pettibone, Attorney for Board] Directing your attention now to Respondent's Exhibit 1. Have you seen that before?

A.[By Cheryl Nichols] Yes, I have.

Q. And, have you read it before?

A. Yes, I have.

Q. And, directing your attention specifically to the six (6) items at the bottom of the page. The ones with asterisks.

A. Yes.

Q. Okay, do you have any personal knowledge of your own — well, first of all let me ask, do you believe that those statements are true?

A. Yes, I do.

Q. All six (6) of them?

A. Yes, I do.

Q. Do you have any personal knowledge of your own to support your belief with respect to the asterisk next to the three (3) words, unwarranted sexual advances?

A. Yes.

Q. Okay, would you tell us about that personal knowledge?

A. Well, from things I've heard from the girls.

Q. No, of your own personal knowledge?

A. Oh, shortly after I started working there I was approached by Johnny Johnson at the counter and he asked me if I went out on my old man, and I said no, and he said that's too bad.

Q. Okay, were you married at the time?

A. Yes, I was.

Q. Directing your attention — is that the only one that you were personally involved in?

A. Yes.

Q. And, were there others you heard about?

MR. KATZ: Objection. On the grounds of heresay.

JUDGE JENSON: Yes, or no?

THE WITNESS: Yes.

BY MR. PETTIBONE:

Q. And, did you hear about the others from other waitresses?

A. Yes.

MR. KATZ: Same objection.

JUDGE JENSON: At this point, overruled. If we go into the content, then there might be something.

BY MR. PETTIBONE:

Q. Directing your attention to that last item, on the handbill, the last one with the asterisk, a filthy restroom for women employees and so on. Do you have any personal knowledge with respect to that to support your belief that it's true.

A. Yes, I do.

Q. Okay, what knowledge do you have?

A. There were always empty sawdust bags in the restroom. You had to walk over those and — to be able to go to the bathroom or anything. There were rarely paper towels, toilet paper and soap in the restroom. It was always filled with brooms and rakes and shoes and sweaters and clothes.

JUDGE JENSON: Well, now were they in the restroom itself or were they in the shower room, the shower?

THE WITNESS: They were in the shower but at times they would be in the restroom.

BY MR. PETTIBONE:

Q. Could you describe for us the layout of this restroom and where this shower is in it if you can?

A. Okay, you go into the bathroom, there's like a little alcove where there was a coat — a place where you could hang your coats and right next to it between that and the wall there was a little shower stall. And, then directly across from it was the sink and the toilet.

Q. Okay, what was adjacent to the restroom?

A. The waitress lounge.

* * * * *

[Pages 844–47]

Q. [By Mr. Katz, Attorney for Restaurant]. You described what you called a sexual advance by Johnny Johnson. You said that occurred shortly after you came to work in the Big Apple. It occurred approximately August of 1977?

A. [By Cheryl Nichols] It could have.

Q. What's your best recollection? As to when it occurred?

A. Well, when I first started working at the Big Apple, I was working in the jail. So, it had to have been after I first started working there.

Q. What's your best recollection as to the month and year?

A. In '77.

Q. Do you have — your best recollection as to the month?

A. I could have been August.

Q. That was the only quote, sexual advance, unquote Johnny Johnson ever made at you, wasn't it?

A. Yes.

Q. And, is was the only quote, sexual advance, unquote that any person of management or in a supervisory position in the restaurant ever made at you, right?

A. Yes.

Q. That was the only one, August of 1977? And, you, when Johnny made what you considered an advance you said no, and he stopped, right?

A. Yes.

Q. And, it had no impact on your job whatsoever did it?

A. No, not that I know of.

Q. And, you never filed any charges with the Equal Employment Opportunity Commission, did you?

A. No.

Q. And, you never took any action whatsoever with respect to it, until what, over a year later when the leaflet was handed out, right?

A. Yes.

Q. Did you write the leaflet?

A. No.

Q. When did you first see the leaflet?

A. After it had been passed out.

Q. Okay.

JUDGE JENSON: Anything else?

MR. KATZ: No, no other questions.

MR. PETTIBONE: No questions, Your Honor.

JUDGE JENSON: Did you ever tell anyone about that incident?

THE WITNESS, Yes, I did.

JUDGE JENSON: When?

THE WITNESS: After it happened.

JUDGE JENSON: Right after or some time after?

THE WITNESS: That evening I told my husband.

JUDGE JENSON: Did you ever tell anyone that worked at the restaurant about it?

THE WITNESS: Yes.

JUDGE JENSON: Who?

THE WITNESS: A couple of the waitresses that worked there.

JUDGE JENSON: Do you remember who?

THE WITNESS: I think I told Carla Scott.

JUDGE JENSON: Anyone else that you can recall?

THE WITNESS: Not that I can recall.

JUDGE JENSON: Any more?

MR. KATZ: Not from me.

MR. PETTIBONE: Yeah, a couple, Your Honor.

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Cheryl, prior to distribution of this handbill did you have any knowledge it was going to be distributed?

A. Yes.

Q. How did you acquire that knowledge?

A. Ruth told me.

Q. And, do you recall approximately when?

A. I believe, I don't know when exactly, no.

Q. Can you tell us in general what was said — well, where did she tell you first of all. Do you remember that?

A. I don't remember where she told me, no.

Q. Was it in person or over the phone, do you recall that?

A. I — no.

Q. Do you recall what was said?

A. She told me that they were going to pass out leaflets.

Q. Did she discuss or did she say what the leaflets were going to contain?

A. Not that I can remember.

[Pages 848–51]

DALE MICHAUD

was called as a witness by and on behalf of General Counsel and having been previously sworn on oath was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

* * * * *

Q. Directing your attention to Respondent's Exhibit 1, have you seen that before?

A. [By Dale Michaud] Yes.

Q. Have you read it before?

A. Yes.

Q. Directing your attention to the six (6) items toward the bottom of the page, with asterisks on them. Do you believe those statements to be true?

A. Yes.

Q. Do you have any reason to believe they're not true?

A. No.

MR. PETTIBONE: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q. Did you participate in the preparation of this leaflet?

A. I didn't help prepare it, but I knew, you know, what was going to be on it.

Q. Were you among those who distributed it?

A. No.

Q. And, you didn't write anything that was on here?

A. No.

Q. Did anybody ask you for your opinion about this before it was written?

A. Everything that was written on it was read to me and I went along with everything.

Q. Anybody ever make a unwarranted sexual advance on you at the restaurant?

A. No.

Q. Neither management — rather no management?

A. No.

Q. Did you tell the writers of this leaflet that?

A. Well, I told them I had heard a lot of stories —

Q. Answer my question. The question is, did you tell them that no one ever made a sexual advance at you in the restaurant?

A. Oh, yes.

Q. You did tell them that?

A. Yes.

* * * * *

[Pages 853–56]

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Who did you discuss the leaflet with prior to its distribution?

A. [By Dale Michaud] I talked about it with Ruth.

Q. And did you in that discussion, did you discuss the sixth item on — the last item on the handbill, the restroom?

A. Yes.

Q. What facts or what personal knowledge did you have on that sixth item?

A. Well, everytime you went to the restroom either you were out of toilet paper or you were out of paper towels. There was never any soap in there. And, then the sawdust bags were just thrown in the shower along with the brooms and everything. It was just filthy. Bathroom, you know.

JUDGE JENSON: You mean it was filthy or just messy?

THE WITNESS: No, it was just messy, yes.

JUDGE JENSON: You know, filthy to me denotes dirt and perhaps unpleasant smelling materials and so on on the floor, was it like that? At any time?

THE WITNESS: Well, there was no garbage cans, and whenever there was paper towels, you have to put them in the sawdust bags, which most of the time is on the floor, you know was thrown on the floor instead of being put in the bag.

JUDGE JENSON: Is that what you mean by filthy, that there were paper towels on the floor?

THE WITNESS: Well, yes. You know it was messy and disorderly.

JUDGE JENSON: Well, was it swept out? Weren't the girls supposed to sweep it out?

THE WITNESS: Yes, it was swept once a day.

JUDGE JENSON: Go ahead.

BY MR. PETTIBONE:

Q. Was there ever sawdust on the floor?

A. It was brought in from, like when we came in from lunch, you know, it was brought in then.

Q. It was brought in the restroom. Was there ever any sawdust from those sawdust bags that was on the floor?

A. Yes.

JUDGE JENSON: Well, the sawdust bags, what were they used for to carry clean sawdust that was dumped on the floor, is that what they were?

THE WITNESS: Yes.

JUDGE JENSON: Then what happened after the sawdust — was the sawdust swept up every night, do you know?

THE WITNESS: I'm not really sure. I don't know.

JUDGE JENSON: Well, was that sawdust put into the lady's, into the women's restroom?

THE WITNESS: No.

JUDGE JENSON: The stuff that came off the floor wasn't?

THE WITNESS: No.

JUDGE JENSON: So any sawdust that was in the restroom was debris that had been left in the bags which had been used to put into the restaurant, is that right?

THE WITNESS: Yes.

JUDGE JENSON: So, it would have been clean sawdust, so to speak?

THE WITNESS: Yes.

JUDGE JENSON: All right.

MR. PETTIBONE: I have no further questions, Your Honor.

MR. KATZ: Nor I.

JUDGE JENSON: Who takes care of scrubbing the lavatory in the women's restroom?

THE WITNESS: I have no idea.

JUDGE JENSON: Well, was it kept scrubbed? Or not?

THE WITNESS: Sometimes it was clean and sometimes it wasn't.

[Page 857]

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mr. Kalfus, what is your occupation?

A. I am in the restaurant business, employed by Bill Johnson's Restaurants.

Q. And, what position do you occupy there?

A. At this time, I am serving as a manager in all the Big Apple Restaurants and assisting in the accounting department.

[Pages 858–59]

Q. [By Mr. Pettibone, Attorney for Board]: You're aware that Bill Johnsons has brought a lawsuit against Ruth Helton and other pickets aren't you?

A.[By Don Kalfus] Yes.

Q. And, you were present on the 2nd of October of this year during Ruth Helton's deposition in connection with that lawsuit weren't you?

A. Yes, I was.

Q. And at that deposition you heard her testify did you not, that in 1972 Sandra Lambertus exited the Bill Johnson's kitchen at 3757 East Van Buren red faced and told Ruth Helton that she had just taken a cup of coffee to you and that you had held her and kissed her in front of the cooks?

* * * * *

BY MR. PETTIBONE:

Q. Do you recall that?

A. I recalled Ruth giving some testimony referring to an incident where I kissed Sandra in the kitchen, yes.

Q. Okay, and your deposition was taken in connection with the lawsuit on or about November 10th of this year, wasn't it?

A. Yes.

Q. And, you testified at that deposition regarding that incident, didn't you?

A. I did.

Q. And, with respect to that incident, you testified that you did indeed kiss Sandra Lambertus in the kitchen, correct?

A. Yes.

[Pages 865–69]

BY MR. PETTIBONE [Attorney for Board]:

Q. Didn't you also testify at that deposition that you thought you had put your arms around Ruth Helton and kissed her since 1972?

A.[By Don Kalfus] I don't recall ever kissing Ruth Helton.

Q. Didn't you testify in the deposition that you thought you had put your arms around Ruth Helton and kissed her, since 1972?

A. No, as I recall the way the questions was asked —

Q. Is your answer, yes or no?

MR. KATZ: Well, let him answer. He's trying to answer the question.

JUDGE JENSON: He said, no, and then he started to say he remembered how the question was.

A. As I recall, I was asked if I had ever put my arms around Ruth Helton. My answer to that is, it's possible I put my arm around Ruth Helton but not in the sense that the question was asked when

the deposition was taken or not in the sense that the question is asked now.

Q. Mr. Kalfus, do you recall testifying at that deposition that you didn't specifically recall ever kissing Ruth Helton on the neck or putting your arms around her but you supposed you had?

A. In seven and a half years, to put my arm around a girl in the sense of laying my arm around her waist to ask her something or tell her something, not in the sense that there was something derrogatory about that or to take advantage of her.

Q. How about kissing her on the neck?

A. I don't recall ever kissing Ruth Helton on the neck.

Q. Do you suppose you might have?

A. I would think no.

Q. Let me show you a document which purports to be your deposition taken on or about November 10, 1978, in connection with the lawsuit filed by Bill Johnson against Ruth Helton and certain other pickets. I direct your attention to page 62, line 6 to 8, would you please read that to yourself? Did that help refresh your recollection?

A. The question is asked in a compound question.

Q. Did that help refresh your recollection?

A. No. Will you let me answer the question?

Q. Go ahead.

A. The question reads in a compound question. Two questions. Have I ever kissed Ruth on the neck, and have I ever put my arm around Ruth. I suppose in seven and a half years there may have been a time I've put my arm — I don't specifically remember it. But, I can't deny it at the same time. Have I ever kissed Ruth Helton. I don't recall ever kissing Ruth Helton. I don't recall ever kissing Ruth.

Q. Didn't you testify during that deposition that although you don't recall whether you have kissed her on the neck or put your arms around her, you suppose you had?

* * * * *

Q. All right. Let me ask one more time. Didn't you testify during your deposition that although you didn't specifically recall ever kissing Ruth Helton on the neck or putting your arms around her, that you suppose you had?

A. If that's the way I worded my answer in the deposition, than yes, that's the way I answered, by — my frame of mind at the time was, no, I had not put — I hand't kissed her, but I suppose it's possible that I put my arm around her.

Q. All right, let me direct your attention again to page 62, lines 9 through — I'm sorry, lines 6 through 8. Isn't that the way you framed your answer? That you don't recall whether or not you kissed her on the neck or put your arms around her, but you supposed you had?

A. Based on the way the question's worded there, yes.

[Page 870]

RUTH HELTON

was called as a witness by and on behalf of the General Counsel and having been previously sworn on oath, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

[Pages 871–72]

Q.[By Mr. Pettibone, Attorney for Board] I'm going to hand you a document which has been marked for identification as General Counsel's 6. Have you ever seen that document before?

A.[By Ruth Helton] Yes, I have.

Q. When was the first time you saw that document?

A. I saw it hanging in the lounge on the Christmas of '76.

MR. KATZ: Christmas of what year?

THE WITNESS: '76.

BY MR. PETTIBONE:

Q. Where in the lounge was it?

A. It was stuck on the door right in front on the bathroom door.

Q. That's the lounge in the Big Apple on East Van Buren?

A. That's right.

Q. What does that document relate to?

A. It relates to the coming weekend that was the Christmas holiday season, and that we was not to call in sick over the holiday season.

[Pages 873–83]

Q.[By Mr. Pettibone, Attorney for Board] Let me show you Respondent's Exhibit 1. And ask you if you've seen that document before?

A.[By Ruth Helton] Yes.

Q. Do you have any connection with that document other than having seen it before?

A. I drafted most of it.

JUDGE JENSON: Off the record.

(Discussion off the record.)

JUDGE JENSON: On the record.

BY MR. PETTIBONE:

Q. You say you drafted most of it. Do you know who drafted the remainder of it?

A. We drafted it together.

Q. Who's we?

A. Lois Dirkson and myself.

JUDGE JENSON: Lois who?

THE WITNESS: Dirkson.

BY MR. PETTIBONE:

Q. Did you do this together at the same location?

A. No, we did it over the telephone.

Q. Who called who?

A. As I recall Lois called me to ask me how she was going to help us picket. She hadn't made it down and asked us how it went.

Q. Okay, who brought up discussion with respect to Respondent's Exhibit 1?

A. She asked me how did we explain some of the thing, you know, to the newsmen or whatever. And, I said, well, we're still kind of confused as to you know, one wants to say one thing and one wants to say the other. And, she said, well, why don't we sit down and write up a list of the girl's complaints that you've heard them complain about, and put them all down so that you could just hand out a leaflet.

Q. And, did you follow her advice?

A. Yeah.

Q. How did you go about actually preparing a leaflet? This Respondent's Exhibit 1?

A. I had talked to Virgina Classman and she said that we could hand out a leaflet and that we could say anything as long as it was truthful.

Q. Who is Virginia Classman?

A. She is the hotel, restaurants and bartenders union representative, here in Phoenix.

Q. Okay, and do you recall when about you had that conversation with her?

A. I had it on Thursday, September, no, I had it on Wednesday, September the 20th.

Q. And, when did you actually prepare Respondent's Exhibit 1?

A. When did I actually prepare the — we wrote it out on a pad, and then on Thursday I took it in and had it typed up.

Q. And, where did you take it in to have it typed up?

A. I took it down to the — on 1st Avenue to Virginia Classman's office.

JUDGE JENSON: Who helped you write it up?

THE WITNESS: Who helped me —

JUDGE JENSON: Write it up, you said —

THE WITNESS: Lois Dirkson helped me write the one portion and then George Classman, who's Virginia's husband actually sit down and put it in these words.

BY MR. PETTIBONE:

Q. Now, at the time you drew this up, did you believe everything in there to be true?

A. I knew it was true.

Q. Okay, let's go to the items with asterisks next to them. What personal knowledge do you have to believe that the first one is true? The eight (8) hour shifts with no breaks?

A. I had worked it for approximately five (5) years. The first two (2) years I was there we did have a specified break. And, then after that there was just no specified breaks at all.

Q. You did get breaks didn't you?

A. If it wasn't too busy we did.

Q. Okay, how about the second item. What knowledge did you have, personal knowledge, to support your belief that that was true?

A. Well, I had never been paid for overtime. I know that when we came in at 6:00, we was marked down at 2:00. If we stayed to 2:30 or 3:00 we was marked out at 2:00.

Q. And, there is those days where you stayed till 2:30, that's after your shift was over?

A. It was a half an hour after, you know, sometimes, quarter to 3:00, forty-five (45) minutes after my shift was over.

Q. And, how many hours would you have worked on those days, approximately?

A. Well, approximately eight (8) hours forty-five (45) minutes or eight (8) hours, right at nine (9) hours.

Q. What about the third item?

A. I had not only saw the sign that was —

Q. You're referring to General Counsel's Exhibit 6?

A. Yes, I had also saw one posted in the lounge on a holiday after that. And, I think it was the 4th of July weekend, but I couldn't recall what holiday it was.

Q. Okay, what about the fourth item, inconsistent management practices. What personal knowledge did you have to support your belief that that was true?

A. Well, it was constantly happening to me. While I was there.

Q. Well, tell us about the times that happened that you can recall?

MR. KATZ: Well, I don't think it's necessary, Your Honor. We concede in seven and a half years, there were probably some inconsistent management practices that Ruth Helton saw.

MR. PETTIBONE: Well, do you so stipulate?

MR. KATZ: Well, it's on the record. I just said it.

MR. PETTIBONE: All right.

JUDGE JENSON: Proceed.

BY MR. PETTIBONE:

Q. How about the next item, unwarranted sexual advances. What personal knowledge do you have to support your belief that that was true?

A. I had happened to me. I've seen it happen to other people.

Q. Okay, let's talk about the times it happened to you first. When was the first time it happened to you that you can recall?

A. I think it was in the — I'm sure it was when they had the flood in '74, I think it was. I'm not exatly sure.

Q. Okay, where did this occur?

MR. KATZ: Objection, Your Honor, on grounds of relevance. It was four (4) years before the leaflet was distributed.

MR. PETTIBONE: Your Honor, as I said before the —

JUDGE JENSON: Overruled.

BY MR. PETTIBONE:

Q. Do you recall where it occurred?

A. Yes, I was working the side room. I was working from 6:00 to 2:00 going back and night and working from 5:00 till 10:00 at night, and the side room, the offices was now where the customer's bathroom is, and that was where at that time, we had a timeclock. And, —

Q. Excuse me. That's in the offices where — what were the offices at that time?

A. What were the offices at that time.

Q. Please continue.

A. As I went back to punch out my timeclock, Johnny Johnson walked in behind me, closed the door to the office, said, where are you going. And, I said, home. And, he said, why are you going home, you're not getting any at home. And, I said I have to go home, my little boy is home. And, he again, pushed me up against the timeclock, said he could help my out while my husband was away. And, I again told him I had to go home, and he said, well, I don't know why, you're not getting any there. And, I said I would rather do without than anything you have to offer. At this time, he did let me go, and I walked out the door.

Q. Was anyone else present at that time in that office?

A. No.

Q. And, during that time was your husband at home with you?

A. No, he wasn't.

Q. What's the next incident, if there were any, that you had personal knowledge of?

A. Well, it was a couple years back, in '76, and I went into the girls' lounge and the bathroom door was closed, and I said, who's in there because I didn't see any book or anything for the waitresses, and Johnny Johnson said, I am.

Q. Let me interrupt for a second. You say you didn't see any book for the waitresses. What are you referring to?

A. Well, when the waitresses would go into the restroom, they always would take off their gun belt and their book and put it on a chair in the lounge. And, you could usually tell by the name on the book who was in the bathroom.

Q. Okay, how do you know it was Johnny Johnson who answered?

A. Because he said, I am.

Q. Well, how do you know it was him?

A. Well, later I saw him come out.

Q. How much later was that, do you recall?

A. Oh, it was a couple minutes later. And, I talked to him.

Q. Okay, please continue before I interrupted you.

A. Okay, when I asked him who was in there, he said, I am and it's up and I can't get it down. And, he said, would you come in and help me. And, I said, no, I don't think so. And, he said, if you don't I'm going to have to lay it down on the side and raise up the lid and hit it real hard. Otherwise I'm going to have to go back out in the restaurant like this. And, I said, when you come out, just don't tell me what you've done. And, I went back out into the restaurant and I think I told Sandy or one of the other girls. The gross remark that he had just made.

Q. Okay, when's the next incident that you can recall that you have personal knowledge of?

A. Well, with Johnny that was about the only time that he ever really said or did anything.

Q. How about anybody else in the other managers at the restaurant?

A. Oh, Don Kalfus up until almost the time I left when he would come up and ask me when we was going out. When he was going to get the date I promised him. And, he would put his arms around you and kiss me on the neck and —

Q. Did you make any response when he asked you when he was going to get the date you had promised him?

A. I told him I didn't promise him one. And he said, no but we are going out aren't we.

Q. Okay, when did — you said this happened on more than one occasion?

A. Well, it happened on a number of occasions where he'd walk up and kiss you on the neck.

Q. How about this occasion where he said, — asked you if you wanted to go out with him. This particular one.

A. Well, he had told me, you know, he had asked me out off and on, quite a few times.

Q. Are there any other incidents where you can recall where you were personally involved?

A. Oh, I was involved with — Don came up to us one day at the —

Q. Who's us?

A. Me and Penny Toms. Penny Toms was standing there when he first came up and approached us and started talking. And, he asked if I could tell if he was right handed or left handed. And, I said, how would I know that, and he said can't you tell which side is it's on.

Q. I'm sorry.

A. He said could I tell which side it was on.

Q. Okay, did you make any response?

A. I said, not really and he said, if you can't tell by looking, you can start feeling.

Q. When was the next incident that you can recall? That you were personally involved in?

A. I think other than him walking up and asking me for a date or something, that's about all.

Q. Okay, were you aware of any, or did you learn of any other incidents involving other waitresses?

A. Well, I had seen Don the day he came into the lounge and attempted to kiss Carla.

Q. When was that?

A. That was about four (4) months before I quit. It was early '78, sometime then.

Q. Okay, and what did you observe on that occasion?

A. I observed Don coming out of the — I think he was in the bathroom or he came into the lounge on his way in, and Carla was standing by the blackboard. He put his arms around her to a way where he was kind of pinning her towards the blackboard. And, he gave her a hug and as he started to give her a kiss, Carla ducked under his arm and went right out the door.

Q. Okay, did you observe any other incidents involving other waitresses that you can recall?

A. I observed Sandy after she'd been kissed but I didn't observe her getting kissed, no.

Q. What instance are you referring to now?

A. It was back, after, well, right when I first went there. The day that she came out of the kitchen and she told us that Don and — she had been told to take him a cup of coffee. She took it back there, he had held her and gave her a kiss in front of all the cooks and embarrassed her then.

[Pages 892–96]

Q.[By Mr. Katz, Attorney for Restaurant] Do you know of anybody who's ever been fired for not coming in due to illness over the Christmas holiday season? At the Big Apple?

A.[By Ruth Helton] Not that I can recall, no.

Q. So, in seven and a half years, as far as you know, no one has ever been dismissed for losing time due to illness over the Christmas holiday season, right?

A. No, I don't remember anybody ever being fired for it.

Q. Okay. Ever tell off colored jokes at the restaurant?

A. Sometimes, to the girls.

Q. How frequently?

A. What do you mean by off color?

Q. Well, you said sometimes, what did you mean when you said sometimes off color? How do you interpret it?

A. Well, I mean sometimes we'd tell Polack jokes or whatever.

Q. I'm thinking of dirty jokes. Jokes involving sex or something like that. Did you ever tell any jokes like that?

A. Sometimes, if there's just girls around.

Q. In the restaurant?

A. In the lounge.

Q. And, ever tell it in the restaurant to anyone who was not a waitress? Busboys, management people, anything like that?

A. I can't recall just ever telling them a dirty joke. Now, if they came in when we was telling one, we didn't hush.

Q. What was the atmosphere like at the Big Apple Restaurant in terms of the relationships between males and females who worked there? Was it a very stiff formal relationship or was it something else?

A. Some of it it was stiff and formal, it was according to who you were.

Q. How about you, what was your relationship with the people you worked with?

A. I thought it was pretty good.

Q. Was it stiff and formal or was it casual and friendly?

A. With Suzie and Sherry it was casual and friendly.

Q. Did you consider Suzie to be a friend of yours?

A. I had.

Q. You described some incidents that you referred to some unwarranted sexual advances. Did you discourage or encourage such advances?

A. I discouraged them, as far as I was concerned.

Q. Did you complain about them?

A. I had told people about them.

Q. Did you complain about them to anyone in management?

A. Did I complain about them?

Q. Complain about them?

A. I had said that I didn't think it was right. And, they had just told that this were the way things were.

Q. To whom did you tell that you didn't think it was right?

A. I told Suzie. I didn't really tell her — it hurt my feelings a lot that he had did this at a time whenever my husband was away and that I was already feeling down.

Q. This was in 1974?

A. Yes.

Q. Okay, after that in 1974 did you ever complain to anybody about unwarranted sexual advances?

A. No, I never really complained about them.

Q. Okay, did you ever file a charge with the equal Employment Opportunity Commission or anything like that?

A. No.

Q. Did you ever feel that it had an adverse impact on your job in any way? That you didn't submit to a sexual advance?

A. Well, I seen some of them getting —

Q. Your job, did it ever have an adverse impact on you, your job?

A. No, I was allowed to do pretty much what everybody else was.

Q. Did you ever have any trouble discouraging an advance or putting it off? Did you ever tell them to leave me alone and they didn't stop, or did they stop when you said leave me alone?

A. Sometimes they did, but they always came back and tried it again.

Q. Did you consider it flirtatious?

A. Did I consider it what?

Q. Flirting? Were they flirting with you? Playing around, teasing, kidding?

A. No, I didn't take it that way.

Q. The last sexual advance that Johnny Johnson ever made to you was in 1975 wasn't it? That was the last time anything like that ever happened to you, from Johnny Johnson?

A. Around '75 or '76 somewhere around there.

Q. Well, let's try and recall, was it '75 or '76 or what?

A. I really can't tell you the exact year. I know it was '75 or '76.

Q. Other than the incidents you described, with Johnny Johnson and Don Kalfus, were there any other sexual advances made to you? By management personnel?

A. Not that I can recall. I'm sure there was, but I can't remember them off hand.

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[Pages 898–901]

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Just a couple of quick questions, Your Honor. Ruth, with respect to that last item on the handbill. The restroom, what facts did you have of your own personal knowledge to support your belief that that was true?

A.[By Ruth Helton] I had been in the restrooms lots of times when they was no paper towels, where the soap machine on the wall, but there was never any soap in it. And, there was stagnated water in the shower stall that was in there because the sawdust bags when they were thrown in there had clogged up the — the sawdust had clogged up the drain to the shower. The water had been turned on or had been leaking and there was a half an inch or so of water in there.

Q. When was that?

A. This was right before I quit.

Q. Can you give us what month that would have been in?

A. I know that they painted it — the part back there — it was in August.

Q. And, when you said they painted it — you're referring to what?

A. They painted the back portion of the bathroom and I recall asking a week before I was fired. And, I remember asking the guy if he was going to paint the outside and clean out the shower and he said, no that they was just going to paint that portion back there and that later on maybe they'd get around to doing the rest of it.

Q. Is that the occasion when you observed this stagnated water?

A. Yes.

MR. PETTIBONE. No further questions.

RECROSS EXAMINATION

BY MR. KATZ:

Q. When was the date when you observed the water?

A. Well, it was in there, you know, in July, all of July.

Q. Of what, '78?

A. Yes.

Q. Where did the water come from?

A. There was a shower stall and the sawdust had clogged up the drain and someone had turned on the shower or the shower constantly dripped.

Q. Isn't it true that that shower hadn't been connected to any water for about ten (10) years?

A. No, that's not true.

Q. Have you ever seen that shower used?

A. I never seen it used, but I've seen water dripping out of it a lot of times.

Q. Did you report that condition to somebody? When you saw that?

A. When I saw the water?

Q. Yes, did you tell somebody about it?

A. I just mentioned to Suzie one day, it was really filthy in there, and Jean Johnson overheard me, and she said, yeah, they was going to get it painted and cleaned up.

Q. And, was it then cleaned up?

A. The back part was painted but no, it wasn't cleaned up.

Q. Nobody cleaned up the water on the floor?

A. It wasn't on the floor. It was in the shower. They was — the shower came up about this tall, and the water was inside the shower.

Q. What do you mean inside the shower, you mean, what was it clinging to, what was the water on?

A. It was in the bottom of the shower. The shower was like a partition like this and it was in here.

Q. It was in the floor of the shower?

A. Yeah.

Q. Did anybody clean it up?

A. Not to my knowledge.